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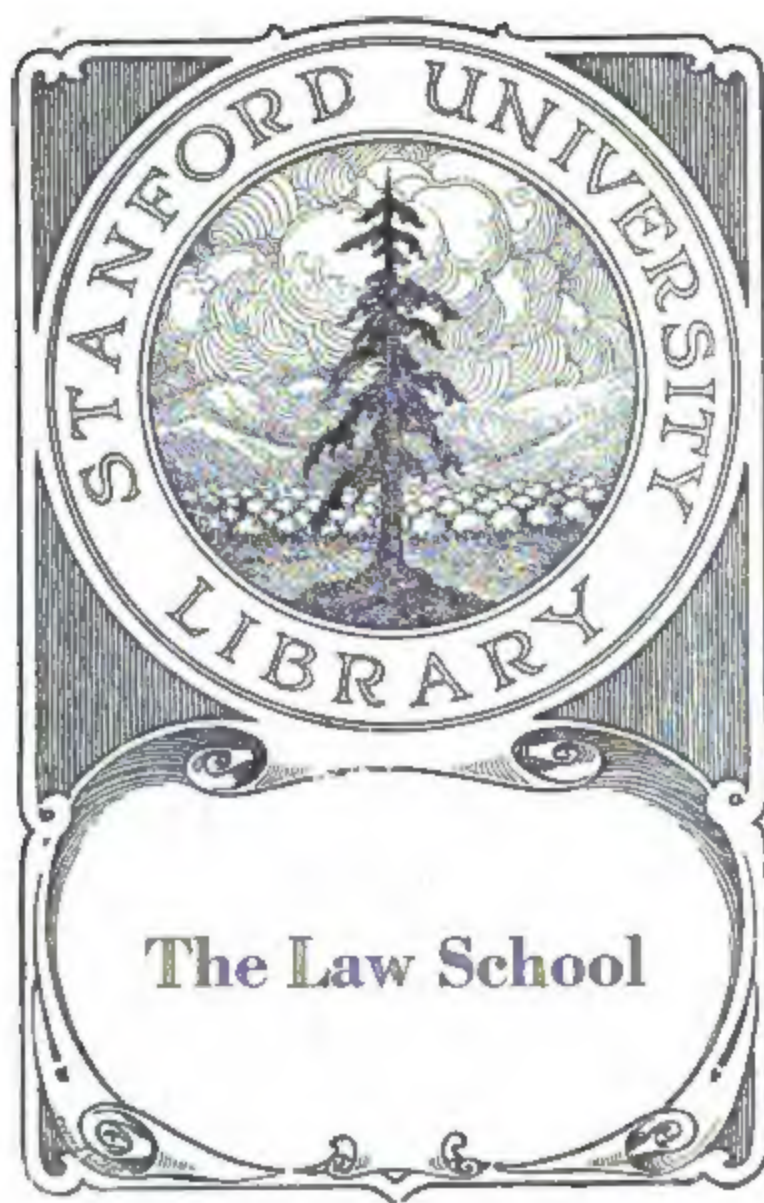
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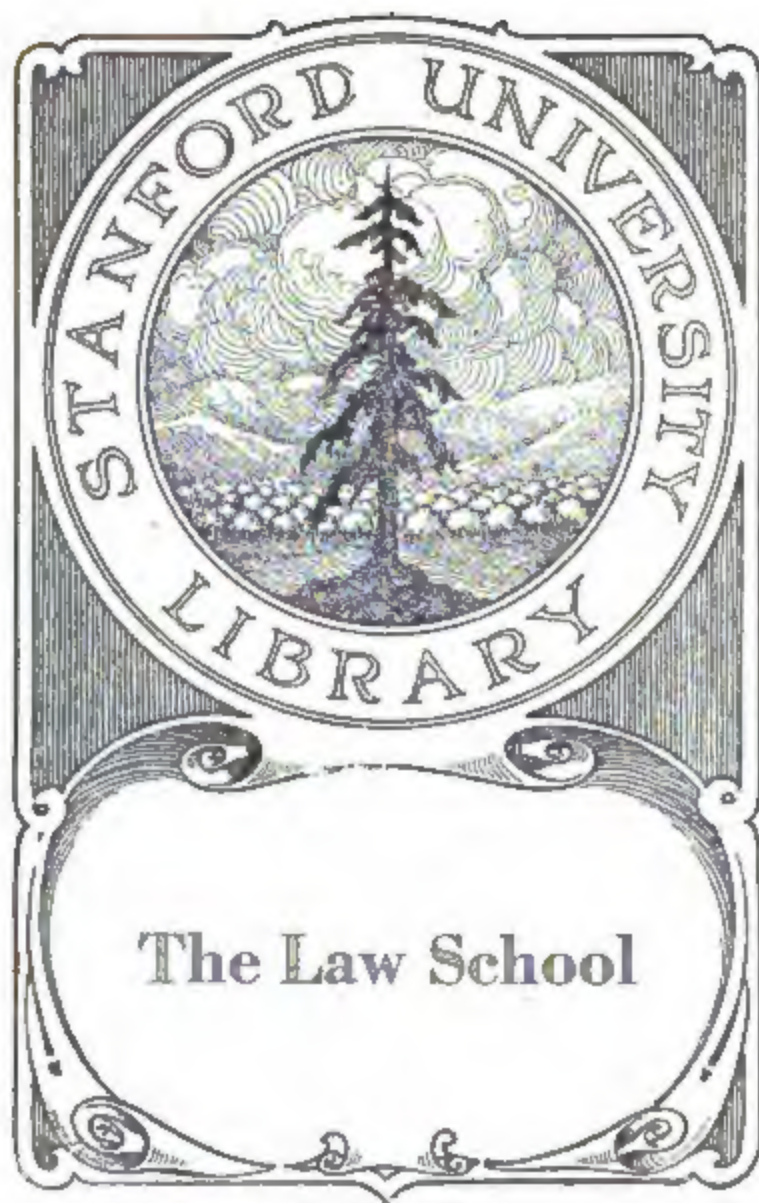
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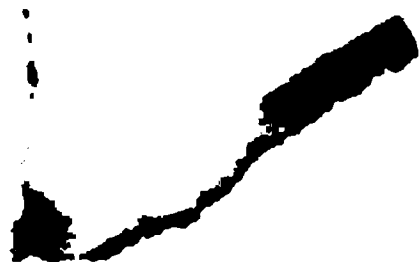






**F CASES**





**REPORTS OF CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

**SEPTEMBER TERM, 1901—JANUARY TERM, 1902.**

**[UNOFFICIAL.]**

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**VOLUME II.**

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**LEE HERDMAN,**

**REPORTER.**

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**LINCOLN, NEB.:**  
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# SUPREME COURT

1901—1902.

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\*Until January 9, 1902.

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‡Until January 7, 1902.

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**In the cases reported in this series the court has approved the conclusion reached, and adopted the recommendation made as a correct disposition of the particular case in which the decision is rendered. They are unofficial in the sense that the court has not necessarily approved all of the propositions of law advanced as indicated either in the syllabi or in the opinions themselves.**



# **LAW ESTABLISHING THE SUPREME COURT COMMISSION.**

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Laws, 1901, chapter 25, page 331.  
Compiled Statutes, 1901, chapter 19, sections 22e to 22k.

---

SECTION 1. The Supreme Court of this State, is hereby authorized to appoint by the unanimous vote and order of the Judges of said Court, nine (9) Commissioners of said Court and such stenographers as the Court may, from time to time, deem necessary for the aid of such Commissioners.

SECTION 2. No person shall be appointed as such Commissioner who is not a practicing lawyer in good standing, possessing the qualifications required for the office of Judge of the Supreme Court of this State, and none of said Commissioners shall practice law while holding such position.

SECTION 3. Each of said Commissioners and stenographers shall hold his position for the period of two years from and after his appointment, unless his appointment be withdrawn by the Supreme Court by the unanimous vote and order of the Judges thereof, before the expiration of said time.

\* \* \* \* \*

SECTION 6. All vacancies occurring in the position of Commissioners or stenographers therefor, shall be filled in like manner as an original appointment.

SECTION 7. The Supreme Court shall prescribe by general rule, the mode of hearing and procedure before said Commissioners, as well as the duties of such Commissioners and stenographers.

SECTION 8. Whereas, an emergency exists, this Act shall take effect and be in force from and after its passage and approval.

Approved March 19, 1901.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF NEBRASKA**  
**SEPTEMBER TERM, A. D. 1901.**

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**PRESENT:**

**HON. T. L. NORVAL, CHIEF JUSTICE.**  
**HON. J. J. SULLIVAN,**  
**HON. SILAS A. HOLCOMB, } JUDGES.**

**DEPARTMENT No. 1.**

**HON. WILLIAM G. HASTINGS,**  
**HON. GEORGE A. DAY,**  
**HON. JOHN S. KIRKPATRICK,**

**DEPARTMENT No. 2.**

**HON. SAMUEL H. SEDGWICK,**  
**HON. WILLIS D. OLDHAM,**  
**HON. ROSCOE POUND,**

**DEPARTMENT No. 3.**

**HON. EDWARD R. DUFFIE,**  
**HON. JOHN H. AMES,**  
**HON. I. L. ALBERT,**

**COMMISSIONERS.**

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**AMOS E. EMORY, APPELLEE, V. DANIEL F. BOYER ET AL.,**  
**APPELLANTS.**

**FILED NOVEMBER 20, 1901. No. 10,390.**

**Commissioner's opinion. Department No. 1.**

- 1. Judicial Sales: APPRAISAL: OBJECTIONS WHEN MADE.** Objections to an appraisal of real estate on a judicial sale come too late if made only after the sale has been made.
- 2. Judicial Sales: COPY OF APPRAISAL: PURPOSE: CLERICAL DEFECT.** Copy of appraisal is filed to serve as a guide for bidders and parties at the sale and a mere clerical defect will not vitiate a substantially correct copy.

Emory v. Boyer.

APPEAL from the district court for Phelps county.  
Tried below before BEALL, J. *Affirmed.*

*Roberts & St. Clair*, for appellants.

*Pulsifer & Alexander* and *A. B. Coffroth*, contra.

HASTINGS, C.

The sole question presented in this case is upon an objection to the confirmation of a sale, for the reason that "a true copy of the appraisal was not filed prior to the advertisement of the sale and notice, or thereafter." The objection was filed April 18, 1898. The appraisement was made September 21, 1897, and copy filed on September 28, 1897, and sale made November 4, 1897. Under the rule of *Hamer v. McFeggan*, 51 Neb., 227, that objections to the appraisal must be filed before the sale to be considered, this was entirely too late. The objection seems not well taken; the defects in the copy do not seem to be material. They consist, first, in the fact that the certificate to the original is made by the sheriff, the certificate to the copy of the appraisal by his deputy. As the law does not require a certified copy, but only a copy, this objection seems not well taken.

It is also objected that the copy in one place recites the names of the appraisers, where they are left blank in the original. This seems to be true. The blank in the original is at the place where the sheriff in certifying that they were sworn also sets out their names. These names are given in the copy, but do not appear in that place in the original. It does, however, sufficiently appear in the original that the appraisers were sworn, and the defect of the copy seems not material.

It is, therefore, recommended that the order of confirmation be affirmed.

DAY and KIRKPATRICK, CC., concur.

**AFFIRMED.**



First Nat. Bank of Pawnee City v. Manning.

FIRST NATIONAL BANK OF PAWNEE CITY V. HENRY W.  
MANNING ET AL.

FILED NOVEMBER 20, 1901. No. 10,395.

Commissioner's opinion. Department No. 3.

**Attachment and Garnishment: LIABILITY OF GARNISHEE: HOW AND WHEN FIXED.** The liability of a garnishee is to be determined by the status of the fund in his hands at the time his answer is taken, when it appears that at the time of the service of notice of garnishment, the fund sought to be reached was not the subject of garnishment, but afterward, and before the taking of the answer, became so.

ERROR from the district court for Pawnee county.  
Tried below before LETTON, J. *Reversed.*

*Story & Story*, for plaintiff in error.

*F. A. Barton, Lindsay & Raper and Conley & Fulton,*  
*contra.*

ALBERT, C.

This action was brought by the First National Bank, of Pawnee City, against Henry W. Manning and Levi B. Manning. The action was aided by attachment, and Henry L. Clark was attached as garnishee. Service was had on the defendants by publication. The garnishee answered, whereupon the court entered an order discharging him. From that order the plaintiff prosecutes error to this court.

The order complained of is based on specific findings, which are as follows:

"And now on this 24th day of September, 1898, this cause came on for further hearing upon the answer of the garnishee and his testimony heretofore given in open court and the special appearance of the defendants objecting to the jurisdiction of the court, and the court after hearing the arguments of the counsel finds: First. That two notices of garnishment were served on the garnishee, one

First Nat. Bank of Pawnee City v. Manning.

in December, 1895, and one in July, 1898, and the answer day under the second notice was September 19, 1898. Second. That notice of the pendency of this action was had on the defendant by publication, based on said two garnishments, which publication was had prior to August 20, 1898. Third. That the said executors' accounts were settled and an order of distribution made to distribute said estate to the legatees and distributees on August 20, 1898, at 2 o'clock P. M. Fourth. That all the funds in the hands of said Henry Clark, belonging to the defendants were held as an executor and not as an individual. Fifth. The court therefore finds that the garnishee is not liable in this action the two notices of garnishment having been served on him prematurely."

From the foregoing findings, it appears that when the notice in garnishment was served on the garnishee, there were funds in his hands as executor, eventually payable to the defendants; that afterward, and before the answer was taken, he was directed, by an order of distribution, to pay said funds to the defendants. It would further appear from the findings, that the garnishee was discharged on the theory that the funds in his hands were, at the time the notice was served, in the custody of the law, and, therefore, not subject to garnishment. Sections 221 and 224 of the Code of Civil Procedure, so far as material at present, are as follows:

"Section 221. \* \* \* He shall appear and answer under oath all the questions put to him touching the property of every description and credits of the defendant in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant whether due or not, and in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of notice."

"Section 224. If the garnishee appear and answer, and it is discovered on his examination, that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was

First Nat. Bank of Pawnee City v. Manning.

indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee, into the court."

From the foregoing, it is clear to our minds, that the liability of the garnishee is to be determined, not by the status of the fund in his hands at the time of the service of notice in garnishment, but by its status at the time his answer was taken. As appears from the finding, before the answer of the garnishee was taken, the county court had made an order of distribution in the estate whence the fund in question came, and the capacity of garnishee in the premises had changed from an official obligation to a personal liability. Under such circumstances, the fund is subject to garnishment in his hands. Shinn, Attachment and Garnishment, section 506. And as this liability existed at the time his answer was taken, the court erred in discharging him.

It would appear from the record, that the order quashing the service on the defendants was based on the assumption that the fund in the hands of the garnishee was not subject to garnishment, and that, therefore, the court had acquired no jurisdiction either over the persons of the defendants, or any property belonging to them. But, as we have seen, the court did acquire jurisdiction over the fund in the hands of the garnishee. It follows, therefore, that the order quashing the service on the defendants was erroneous.

We recommend that the order discharging the garnishee and quashing the service on the defendants be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

The order of the district court discharging the garnishee and quashing the service on the defendants is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

Ryan v. Donley.

MICHAEL D. RYAN, APPELLEE, v. PATRICK DONLEY, IM-  
PLEADED WITH LINEUS W. MARTIN ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,398.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: STIPULATION FOR SALE OF PROPERTY AND DEPOSIT OF MONEY: WAIVER.** A stipulation in an action pending in a district court that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk until it shall be determined which party to the action is entitled to them, and that, if the sale shall be made before the matter shall be fully litigated, the funds shall be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in this court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication.
2. **Chattel Mortgage Foreclosure: INJUNCTION: EXECUTION BY OTHER CREDITORS: LIS PENDENS.** The pendency of an action for the foreclosure of an alleged chattel mortgage in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, does not withdraw the property from pursuit, by general creditors, of the alleged mortgagor in another court by means of the ordinary procedure of a suit at law, judgment and execution. In such case the property is not in the custody of the law, but the principles applicable are those pertaining to the doctrine of *lis pendens*.
3. **Unrecorded Lease: COVENANTS FOR MORTGAGE ON CROPS EACH YEAR: VALIDITY.** A covenant in an unrecorded lease for the term of five years at an annual rental payable annually, to the effect that the lessee shall on the 15th day of June in each year execute to the lessor a chattel mortgage on the growing crops, to secure the payment of the rent for that year, is void as to the creditors of the lessee.

APPEAL from the district court for Saunders county.  
Tried below before SEDGWICK, J. *Reversed with judgment.*

*Burr & Burr and V. L. Hawthorne, for appellants.*

*John H. Barry, contra.*

**Ryan v. Donley.****AMES, C.**

In 1895 the plaintiff and appellee, Ryan, being the owner of a farm in Saunders county, executed a lease thereof to one Patrick Donley, for the term of five years beginning on the first day of March, 1896, reserving an annual rent of \$440 payable on the first day of January. It was covenanted in the lease that if the average yield of crops of all kinds in any one year, should be less than twenty bushels to the acre, the lessor should accept one-half the same, in lieu of the cash rent reserved for that year, but that the lessee should "execute a promissory note of \$440, on June 15 of each year during the term of his lease, for the payment of the rent for such year, said note to be secured by chattel mortgage on all the crops to be raised on said premises for such year."

Donley went into possession under the lease, which was not filed for record, but in 1897 refused to execute the note and mortgage provided for in the above recited covenant, and on the 31st day of July in that year Ryan began this action, alleging the breach of the covenant, and the insolvency of Donley, and that the latter was threatening and about to sell, dispose of and consume the growing crops, and by so doing defeat the plaintiff of his rent for that year, and that the average yield of the crops for that year would exceed twenty bushels per acre. The petition prayed for an injunction restraining the defendant from selling, incumbering or consuming the crops or any of them, and that the plaintiff be decreed to have a mortgage on the same for the sum of \$440, as of date June 15, 1897, and that the mortgage be foreclosed and the property sold thereunder and the proceeds of such sale or so much thereof as should be necessary, applied to the satisfaction of said alleged indebtedness and costs of suit. A temporary injunction was allowed as prayed and the order therefor filed with the papers in the case, but no service thereof or of the summons is disclosed by the transcript, and it does not appear therefrom when ac-

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tual knowledge thereof first came to the defendant or to the subsequent parties to the case. On the 13th day of December, Donley confessed a judgment in the county court in favor of the appellant, Lehr, for the sum of \$381.30 and costs of suit and on the same day an execution thereon was issued to the appellant, Martin, as constable, and by him levied on a quantity of grain raised on the premises in that year, and claimed to be subject to the alleged lien of the plaintiff's lease. On the 16th day of December the plaintiff filed a supplemental petition joining Lehr and Martin with Donley as defendants thereto, and setting forth the judgment, execution and levy, and alleging that all of such proceedings were had with knowledge by all the parties thereto of the pendency of the plaintiff's action, and of the injunction therein and in contempt thereof, and of the court, and were void, and praying an additional injunction restraining Lehr and Martin from selling or removing the property or any of it under the levy. An additional temporary injunction was granted as prayed. A motion to dissolve this latter temporary injunction was made by Lehr and Martin, and overruled. Then they filed a general demurrer to the supplemental petition, which was also overruled, whereupon they filed an answer thereto admitting the judgment, execution and levy and the existence of the lease, and denying every other allegation therein contained. The plaintiff filed a reply, but it contains no new matter calling for consideration by the court. Donley entered an appearance, but did not answer either of the plaintiff's pleadings or otherwise participate in the defense. On the 11th day of January, 1898, the plaintiff and Lehr made a stipulation to the effect that the latter should haul the grain to market and sell it and receive a certain compensation from the proceeds for his service in so doing, and that the residue of such proceeds should be "deposited with the clerk of the district court until it is determined which party—the said Lehr and Martin or Ryan—is entitled to hold the property so levied upon in favor of Lehr

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by the constable Martin, and when the court shall have made an order that one or the other of the parties, viz., Lehr or Ryan, is entitled to the proceeds of the sale of said property, in the event of the sale of the same before the matter is fully litigated, then the clerk shall pay the same according to the order of said court." The property was accordingly sold, and the proceeds, amounting to \$474.95, deposited with the clerk pursuant to the stipulation, and out of it Lehr was paid \$27, his compensation for making the sale. At the May, 1898, term, Donley was adjudged in default for want of answer, and after a trial without a jury, the court entered a judgment upholding the lease as a valid lien by way of mortgage upon the property in controversy, for the sum of \$440 and interest, adjudging the execution levy to be void, as in violation of the injunction of which the judgment creditor and constable were found to have had notice, and making the temporary injunction perpetual, and directing that the money, the proceeds of the sale of the property, then in the hands of the clerk, be applied first, to the payment of the costs of the suit; second, the payment of \$27 compensation to Lehr for selling the property pursuant to the stipulation; and third, to the satisfaction of the plaintiff's lien, the surplus if any, to be retained by the clerk subject to the further orders of the court.

The circumstances are such that it will be convenient to begin with the discussion of the contentions of the appellee, plaintiff below. He insists first, that the above recited stipulation providing that the property should be sold and the proceeds disposed of as the court should order, amounted to a release of errors and waiver of the right of appeal, and submitted the matter finally to the judgment of the trial court. There is no such expressed agreement in the instrument, and in its absence an intent by a litigant to bar himself of the right of access to the courts should only be made out by the strongest implication. Such an inference cannot in our opinion be drawn from a stipulation requiring the money to remain in the

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hands of the clerk until it is determined which party is entitled to it and expressly contemplating that the matters in controversy shall be "fully litigated." In our opinion the stipulation contemplates a final determination of the suit after it has been fully litigated, which includes the right to litigate in this court if either party desires to do so.

A more important matter of dispute in the case may be conveniently stated in the form of the following inquiry: May A, by beginning a suit against B, for the enforcement by foreclosure and sale of a real or pretended lien upon the property of the latter, and procuring a temporary injunction restraining the sale or disposition of it by him during the pendency of the action, withdraw it from the reach of the general creditors of B, having notice of suit and of the existence of the injunction, so that they may not resort to another court and pursue it, and appropriate it to the satisfaction of their claims by means of the ordinary procedure of an action at law, judgment and execution?

There are three classes of cases in which decisions have been made upon somewhat similar questions. Most of these cases have arisen out of real or seeming confictions between the federal and state courts, but the fact that in such cases the courts owe their origin and jurisdiction to the federal and state governments respectively, does not affect in any way or degree the principles involved in the decisions. The first is when the defendant, after the beginning of the suit, resorts to another court for the purpose of restraining its prosecution, or compelling the cancellation of the instrument sued upon, or of obtaining a decree adjudging it fraudulent and void, and the like. It is universally held that this course cannot be permitted because the court first acquiring jurisdiction of the parties and of the controversy is entitled to retain the cause and pursue it to a final judgment and execution or other disposition, without interference from any other court of co-ordinate or inferior jurisdiction, and that to permit the



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practice in question would be, in effect, to allow the defendant to make his defense in another tribunal than that in which the first suit is pending, and thus defeat the jurisdiction of the latter court. Belonging to this class are the cases of *Union Mutual Life Insurance Co. v. Chicago University*, 10 Biss. [U. S.], 191, 6 Fed. Rep., 443; *Mason v. Piggott*, 11 Ill., 88; *Insurance Co. v. Howell*, 24 N. J. Eq., 239; *The Bank of Bellows Falls v. The Rutland & B. R. Co.*, 28 Vt., 470, and many others that might be cited. In fact the principle is so obvious that authorities in its support ought not to be required.

There is another class of cases in which a court of competent jurisdiction has actually taken possession of the property which is the subject of the action for the purpose of applying it or disposing of it, or adjudging the possession of it, in such manner as the rights of the parties litigant in an action before it may require; or when the property has been seized upon, process issuing out of the court or taken into custody by a receiver appointed in the action, and some person not a party to the suit, but asserting some claim or demand against the defendant therein, or some lien or charge upon the property, or both, resorts to another court of co-ordinate jurisdiction, and by means of process issued out of the latter, seeks to dispossess the court, and its officers, in which the first action was begun and is pending. It is universally held that this practice cannot be tolerated, because it would lead to breaches of the peace and unseemly contests between the different courts and their officers, and result in endless complications and inextricable confusion. Belonging to this class are *Buck v. Colbath*, 3 Wall. [U. S.], 334; *Gaylor v. The Fort Wayne, M. & C. R. Co.*, 6 Biss. [U. S.], 286-291, 10 Federal Cases No. 5,284; *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S., 294, 5 Sup. Ct. Rep., 135. But in cases of this class it is essential to the maintenance of a claim of priority in behalf of the court whose jurisdiction is alleged to have been first invoked, that there should have been an actual or constructive seizure of the property, or

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that a receiver with authority to take possession of it, should have been actually appointed or that an application for his appointment should be pending at the time of the commission of the alleged wrong complained of, although he may not have been actually appointed or qualified, by giving a required bond, until afterwards. *Shields v. Coleman*, 157 U. S., 168, 15 Sup. Ct. Rep., 570. "Of course," says Mr. Justice Brewer, in the case last cited, "the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for full accomplishment of the other purposes named therein." And in *Buck v. Colbath*, *supra*, a leading case upon the subject, Mr. Justice Miller takes occasion to say, "It is only while the property is in the possession of the court, either actively or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not." And again, "It is not true that a court having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

In all the above cited cases, and in all others of the same character, the only question involved is that of jurisdiction. The court first acquiring possession of the controversy and of the property, deprives every other court of

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whatever jurisdiction in the premises it might otherwise have had.

The third class of cases, is that to which the case at bar belongs, in which an action is pending to enforce a lien or to adjudicate a title, but in which the court has acquired, and is seeking to acquire, no possession of the property actual or constructive, and in which such possession is not requisite to the determination of the controversy before it, and no attempt is made to withdraw that controversy to another tribunal. To such cases the principles of the doctrine of *lis pendens*, and not those above discussed are applicable, and persons not parties to the suit may or may not be bound by the result of the litigation, as circumstances and subsequent events shall disclose. A person who claims under or in subordination to one of the parties with notice of the suit, and one who purchases from one of them, after suit brought, whether with notice or not, is bound by the judgment. But a person who claims by title paramount to that in litigation or in hostility or adversely to the title of the lienor or mortgagor, cannot properly be made a party, and his rights cannot, without his consent, be adjudicated in the action. If in the case at bar the lease was, as between the parties, effectual as a mortgage, but the mortgagor had had no title to the property in controversy, the pendency of the foreclosure suit could not have prevented the true owner from asserting his ownership and right of possession, either peaceably or by means of the writ of replevin. If the mortgaged property had been lands, the pendency of the foreclosure suit would not have barred the true owner's right of entry, or have prevented him from obtaining an adjudication of his title and possession of the premises by ejectment. One having a prior and superior lien would not have been estopped from resorting to another court for its enforcement by foreclosure and a sale of the premises. In either case the first action in foreclosure would have proceeded to judgment, order of sale and sale without obstruction or delay. The rights of

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the parties before the court would have been ascertained and determined by its judgment, and the purchaser would have been left to try conclusions, if he chose so to do, with the person who, by any of the means aforesaid, had come into possession of the property, because neither of these persons would, as against the other, have been bound by either of the former adjudications to neither of which were both of them parties.

Now, if, in the case at bar, the alleged mortgage was void as to the creditors of Donley, the plaintiff in error, Lehr, being a judgment and execution creditor, stood in an attitude similar to that of one claiming by title paramount, or of the true owner of the property in controversy, or of one having a superior lien. If this were not so a suit to foreclose a simulated lien and an injunction such as that granted at the beginning of this action, would be instruments both convenient and potent for hindering, delaying and defrauding creditors. The injunction was within the jurisdiction of the court to grant, and during its existence not only was Donley prohibited from selling the property, but a purchaser from him would, in any event, have taken the property subject to the final adjudication in the case and, if he purchased with actual or constructive notice of the order, he would have been punishable for contempt. But a purchaser at execution sale could have availed himself of the rights of the judgment creditor, and if the alleged mortgage was void as to one, it would have been void as to the other also, and an adjudication in an action to which neither was a party could not have validated it. Neither the pendency of the foreclosure suit, nor the injunction, nor both, deprived Lehr of the right of pursuing his claim against Donley to judgment and execution, nor the latter of his statutory right to confess the judgment. That the lease which had never been made of record was, as against the lessee's creditors, void as respects the covenant to execute mortgages upon property not then in being, has been too frequently and too recently held by this court to require repetition.

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It follows from the foregoing that but for the stipulation, the prayer in the answer of the appellants, Lehr and Martin, to be dismissed out of the case with their costs, should have been granted, and that the judgment should have assumed to determine the rights of the appellee and Donley, as between themselves only. The stipulation, however, submitted the rights of all the parties for final adjudication in this action, an act which it was competent for the parties to do.

We therefore recommend that the judgment of the district court be reversed and vacated, and that a judgment be entered in this court, that the appellant, Lehr, has a first lien upon the funds paid into the hands of the clerk of the district court (less the sum of \$27 paid him as his compensation for selling the property in controversy as provided by the stipulation in the record), for the amount of the judgment pleaded in his answer, with interest and costs, and that the appellee, Ryan, has a second lien on said funds for the sum of four hundred and forty dollars and interest, from the first day of January, 1898, and that the said clerk of the district court be ordered to apply said funds first, to the payment of said lien of the appellant, Lehr, and the residue, if any, towards the payment of the said lien of the appellee, Ryan.

DUFFIE and ALBERT, CC., concur.

The judgment of the district court in this cause is reversed and vacated, and a judgment entered in this court that the appellant, Lehr, have a first lien upon the funds paid into the hands of the clerk of the district court (less the sum of \$27 paid him as compensation for selling the property in controversy as provided by the stipulations in the record) for the amount of the judgment pleaded in his answer with interest and costs; and that the appellee, Ryan, have a second lien on said funds for the sum of four hundred and forty dollars and interest from the first day of January, 1898, and that said clerk of the district court be ordered to apply said funds first to the payment of the

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costs of this action, second to the payment of said lien of the appellant, Lehr, and the residue, if any, towards the payment of the said lien of the appellee, Ryan.

**REVERSED WITH JUDGMENT.**

NOTE.—On motion, a rehearing in the above case was allowed, and on July 3, 1903, an opinion on rehearing was filed, written by DUFFIE, C., in which the above judgment was vacated and the judgment appealed from affirmed. This opinion is reported in — Neb., —, 96 N. W. Rep., 234.—REPORTER.

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**S. W. STORM V. D. A. HOLMES.**

**FILED NOVEMBER 20, 1901. No. 10,425.**

**Commissioner's opinion. Department No. 3.**

1. **Appeal and Error: ESTOPPEL TO COMPLAIN.** A party will not be heard to complain of the action of the trial court, when the action complained of was at his instance.
2. **Appeal and Error: JOINT PETITION IN ERROR: EFFECT.** Where two or more parties join in a petition in error, if the judgment is right as to one, it must be affirmed as to all.

**ERROR** from the district court for Madison county.  
**Tried below before ROBINSON, J. Affirmed.**

*Geo. A. Latimer, for plaintiff in error.*

*Powers & Hays, contra.*

**ALBERT, C.**

This action was brought by S. W. Storm, against D. A. Holmes, in the district court for Madison county, to recover on a state of facts, which it is not necessary at this time to repeat. By agreement the matters in difference were submitted to arbitration. The arbitrators found in favor of the defendant, and reported accordingly. Afterward a petition was filed, on behalf of the plaintiff, to set

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aside the report of the arbitrators and for a new trial of the cause. Thereupon, the plaintiff, in his own proper person, informed the court that the motion to set aside the findings of the arbitrators had been made without his knowledge, consent or approval, that he was satisfied with their award, that he wanted no further trouble or expense made in the premises, and asked the court to end the litigation, either by dismissal of the cause, or an affirmance of the award of the arbitrators. Thereupon, George A. Latimer, who appears to have acted as attorney for the plaintiff in the case, made a showing to the court, that he had previously filed a notice of an attorney's lien, "upon the papers in the case and for 50 per cent. of any judgment that might be recovered in the case, and that the same was on file before any instrument attempting to dismiss the plaintiff's said action was filed on the part of the defendant by the defendant attorney in this case" and asked that his rights in the premises should be protected. He also filed a motion asking that he be substituted as party plaintiff in the action. The court overruled the motions of the attorney and dismissed the petition for setting aside the award of the arbitrators, and affirmed said award. The case is brought here on error.

The petition in error, on its face, purports to be that of the plaintiff below. In the petition S. W. Storm is described as plaintiff in error. It begins with the usual formula, "The plaintiff complains of the defendant"; it is signed S. W. Storm, plaintiff, and George A. Latimer, intervener. As appears from the foregoing statement, the action of the court complained of was at the instance of the plaintiff, so that he is in no position to complain in this court. So far as Latimer is concerned, should it be held that he is party to these proceedings, he has joined with the plaintiff in the assignments of error, so that he must stand or fall with the plaintiff. As we have seen, the plaintiff has no standing in this court; it follows that Latimer can have none. *Eickhoff v. Eikenbary*, 52 Neb., 332.

Clement, Bane & Co. v. Kopietz.

We recommend that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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CLEMENT, BANE & COMPANY, APPELLEE, v. CHARLES KOPLETZ ET AL., APPELLANTS, IMPEADED WITH ALLEN BROS. ET AL., APPELLEES.

FILED NOVEMBER 20, 1901. No. 10,428.

Commissioner's opinion. Department No. 1.

1. **Exemption of Homestead from Execution.** In order that property may be exempt from execution sale as a homestead, it must either be occupied by the debtor, or there must be a *bona fide* intention to occupy the property as such at some future time.
2. **Homestead: EXEMPTION: OCCUPATION: EVIDENCE.** Evidence examined and *held* to show neither a *bona fide* occupation of the premises as a homestead, nor an intention to so occupy the premises at any future time.

APPEAL from the district court for Stanton county.  
Tried below before EVANS, J. *Affirmed.*

*McNish & Oleson*, for appellants.

*Geo. L. Loomis*, contra.

KIRKPATRICK, C.

This is a suit in the nature of a creditors' bill brought by Clement, Bane & Co., against Charles Kopietz and Magdalena Kopietz, and a large number of the creditors of the defendants named, to set aside a conveyance of certain land made by Charles Kopietz through a trustee to his wife, Magdalena Kopietz. The facts, briefly stated, are as follows: Charles Kopietz, on the 16th day of December, 1895, and for about a year prior thereto, was engaged in the mercantile business in the village of Dodge, Dodge county, Nebraska. He was indebted to a large number of creditors, and about the 18th day of December, 1895,



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numerous suits were brought against him in the county court of Dodge county, and certain attachments were issued and levied upon his stock of goods. Transcripts of these judgments were filed in the district court of Stanton county on December 19, 1895. On the same day certain attachments were levied upon the land in controversy, and, on the 20th, executions, which had been issued upon the transcribed judgments, were also levied upon the land.

The testimony disclosed that on December 7th, Kopietz had executed a deed of land to one Frank Cerney, who on the same day reconveyed it to Magdalena Kopietz, both of which deeds were made without consideration. These deeds were not recorded until December 18. It appears that Kopietz purchased this land in 1891, some two or three years before he came to Nebraska; that he afterwards broke up a portion of it, and built a small house on the land, and that during the year of 1895, it was being farmed by one Joseph Berdicka, who was employed by Kopietz, and who, with his wife and five children, resided in the house on the land in controversy. Kopietz and his wife testified that on the 16th day of December, Mrs. Kopietz, together with two of her children, left the village of Dodge by rail to go to this land for the purpose, as they say, of holding it as a homestead. Mrs. Kopietz and the hired man each testify that she stayed all night at the village near the land, and came out to the land on the 17th day of December; that she brought a bed and stove and certain chairs, and that she with the two children resided there until March following, having been absent occasionally. Appellees claim, and there is some testimony tending to support their contention, that she did not reach the place until the 19th day of December, after the sheriff had levied the attachments, which was done in the forenoon of December 19th, but before he levied the executions on the 20th. All of the creditors who were defendants filed answers and cross-petitions, setting up their judgments or attachments, and all asked to have the

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transfer from Kopietz to his wife set aside, so that the property might be sold upon execution.

The only question involved is whether the property in question, consisting of about one hundred acres in Stanton county, was exempt from sale as a homestead. It seems very clearly established by the evidence that Kopietz and his wife never in good faith resided upon the premises, and that the presence there of Mrs. Kopietz and the two children from December 17, till the following March was temporary in its nature, and was simply an attempt to prevent the property from being sold upon execution. The court so found, and we can not but say that the finding is fully supported by the evidence. The homestead law should be liberally construed, so as to protect those for whose benefit it was enacted; but it can not be extended to protect land which has not only never been occupied as a homestead, but concerning which the testimony does not show even an intention to so occupy it at any future time. The findings and judgment of the trial court seem to be abundantly sustained by the evidence, and it is, therefore, recommended that the judgment be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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PHOENIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLEE, v. WILLIAM H. HOWE, APPELLANT, IM-  
PLEADED WITH MARTHA M. HOWE ET AL.

FILED NOVEMBER 20, 1901. No. 10,432.

Commissioner's opinion. Department No. 3.

1. **Bill of Exceptions:** IMPEACHMENT OF, BY AFFIDAVIT. A bill of exceptions allowed and signed by the trial judge becomes a part of the record in the case, and its recitals cannot be impeached by affidavits filed for that purpose.
2. **Appeal and Error:** CONFIRMATION OF SALE: SUFFICIENCY OF RECORD. Record examined, and *held* to disclose no error on the part of the court on confirmation of a sale.

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APPEAL from the district court for Webster county.  
Tried below before BEALL, J. *Affirmed.*

*J. S. Gilham*, for appellant.

*George W. Wright*, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale. The bill of exceptions allowed by the trial court discloses no error in the proceedings. A motion to confirm the sale was made May 10, 1898; the court thereupon made an order that the defendant and all persons interested, show cause why the sale should not be confirmed by two o'clock P. M. of that day. At two o'clock P. M. the parties appeared and by agreement the time to show cause was extended to five o'clock P. M. at which time an order was entered confirming the sale, no objections thereto being made by the defendant. This is the case as shown by the record before us.

The defendant complains that the bill of exceptions does not fairly present the proceedings had in the district court. If the trial judge refused to sign and allow exceptions which correctly recited the proceedings had before him, the defendant had his remedy to compel him to do so. The bill of exceptions as allowed becomes a part of the record of the case, and this court is bound by what it recites and the statements and affidavits of an attorney in the case contradicting or qualifying the recitals of the bill cannot be regarded. We recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

**AFFIRMED.**

Dorwart v. Troyer.

FRANK L. DORWART, APPELLEE, V. CHARLES E. TROYER ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,438.

Commissioner's opinion. Department No. 3.

**Judgment at Law:** RELIEF FROM, IN EQUITY. Equity will not relieve against a judgment at law unless the complainant both pleads and proves a defense thereto upon the merits, nor in any case in which he has had knowledge or notice of the pendency of the action in time to make his defense therein, and has negligently omitted so to do.

APPEAL from the district court for Saline county. Tried below before HASTINGS, J. *Reversed and dismissed.*

*John D. Pope*, for appellants.

*Hastings and Hastings, contra.*

AMES, C.

This is an action to enjoin the enforcement of and to procure the cancellation of a judgment of a justice of the peace. The suit in justice's court was in replevin to recover the possession of certain property in the possession of the defendant. A summons was issued and delivered to an officer who took the goods under it, but upon failure of the plaintiff to give the statutory undertaking re-delivered them to the defendant in the suit. The return of the officer upon the writ recites this fact, but fails to show a personal service of the summons upon the defendant. The action proceeded as one for damages, the defendant making default, and resulted in a judgment in favor of the plaintiff. An execution issued upon the judgment and was about to be levied upon the property of the defendant therein, when this action was begun against the officer and judgment plaintiff and a temporary injunction granted restraining the execution of the writ. On the final hearing the injunction was made perpetual and a decree entered as prayed in the petition. There is no

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question that the goods were taken from and redelivered to the possession of the defendant in replevin, personally. He therefore had knowledge of the pendency of the action in the justice's court, and it is not alleged nor proved that he was prevented from making a defense thereto by unavoidable casualty or surprise, nor are any facts pleaded showing that he had a defense thereto. The mere assertion in the petition that he "had a good, absolute and perfect defense to said action" is a mere conclusion of law and insufficient. *Frickes v. Vick Brothers*, 50 Neb., 401. It is true that he alleges that he was at the time sheriff of the county and held the goods under an execution issued on a judgment in favor of Herman Bros., against a partnership composed of one Ida E. Brown and one Robert C. Brown, and that the goods after his levy had been awarded to him upon a trial of the right of property with one W. H. Brown, but these facts have no bearing upon the claim of title of the plaintiff in replevin. In other respects this case is ruled by that of *Osborn v. Gehr*, 29 Neb., 661, in which the judgment attacked was rendered in an action in which no summons had been issued, and by *Bankers Life Insurance Company v. Robbins*, 53 Neb., 44, and cases there cited. It seems to be the settled law of this state that equity will not relieve against a judgment at law, unless the complainant both pleads and proves a defense thereto upon the merits, nor in any case in which he has had knowledge or notice of the pendency of the action in time to make his defense therein and has negligently omitted so to do.

It is recommended that the judgment of the district court be reversed and the action dismissed at the costs of the appellee.

DUFFIE and ALBERT, CC., concur.

The judgment of the district court is reversed and the action dismissed at the costs of the appellee.

REVERSED AND DISMISSED.

McDowell v. Pioneer Savings & Loan Co.

ROBERT H. MCDOWELL, APPELLEE, V. PIONEER SAVINGS &  
LOAN COMPANY, APPELLANT.

FILED NOVEMBER 20, 1901. No. 10,449.

Commissioner's opinion. Department No. 2.

1. **Foreign Building & Loan Association: APPLICATION OF STOCK VALUE TO LOAN.** In an accounting between a foreign building and loan association and one of its members, when there exists a stock purchase and a loan, the transaction is to be treated as a loan and the borrower has the right to have the value of his stock applied to reduce the indebtedness of the mortgage, if he so chooses.
2. **Foreign Building & Loan Association: APPLICATION OF DIVIDENDS TO LOAN.** Any dividends declared or earned on the stock will inure to the borrower's credit, and this may be credited on the mortgage.
3. **Foreign Building & Loan Association: STOCK VALUE: EVIDENCE.** The stock is to be taken as worth the amount that has been paid on it, in absence of evidence as to its actual value.
4. **Foreign Building & Loan Association: EXPENSES NOT APPLIED TO LOAN.** Payments made on account of operating expenses and fines paid belong to the company and should not be credited on the mortgage.
5. **Foreign Building & Loan Association: APPLICATION OF PAYMENTS TO LOAN: WHEN.** Payments made on the stock are not to be applied as payments on the loan until the borrower has elected to have them so applied, and credit for the value of the stock should be given at the time of such election, and not as of the date when the payments were made.
6. **Foreign Building & Loan Association: PREMIUM AND INTEREST: APPLICATION TO LOAN.** Payments made for premium and interest, if not usurious, are not to be credited on the principal of the mortgage debt.

APPEAL from the district court for Nemaha county.  
Tried below before STULL, J. *Reversed with directions.*

*H. A. Lambert and Geo. D. Emery, for appellant.*

*W. H. Kelligar, contra.*

OLDHAM, C.

In October, 1890, one Robert M. Gillan became a subscriber in the National Building Loan and Protective

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Union which subsequently changed its name to the Pioneer Savings & Loan Company, and is now the appellant, for twenty-five shares of its stock. This appellant is a building and loan company, incorporated under the laws of the state of Minnesota, and has its principal place of business in the city of Minneapolis in that state. On December 24, 1890, the said Gillan obtained a loan of \$2,000 from this company for which he gave his note, secured by mortgage on certain real estate situated in Nemaha county, Nebraska. On this loan he obligated himself to pay a five per cent. annual premium and five per cent. annual interest. Afterwards Gillan sold and transferred this real estate to Robert H. McDowell, appellee, who assumed and agreed to pay this mortgage. The monthly installments that were due on these shares of stock were \$21.75 and the additional sum of \$16.67 was charged for the premium and interest on the loan, aggregating monthly payments in the sum of \$37.92. These payments were made for seventy-five months until the maturity of the loan by Gillan and by the appellee, McDowell. In addition to these payments there were three monthly payments of \$21.75 made by Gillan on the stock before obtaining the loan.

After demand made by the appellee on the appellant to cancel and discharge this mortgage on the ground that it was paid in full and refusal by the appellant, the appellee filed his petition in the district court of Nemaha county alleging these seventy-eight payments aforesaid, and charging, that by reason of these payments, the mortgage was fully paid, and prayed for a decree cancelling the mortgage. The appellant filed an answer in substance admitting these payments but alleging that but \$1,495 of this amount was paid upon the stock, the balance being credited as follows: \$1,266.91 on premiums and interest; \$162.50 on quarterly installments which, by the by-laws, is used to pay the current or operating expenses of the company and \$51.50 as fines, and that there were no dividends to be credited; and also alleged that the com-

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pany is going through the voluntary liquidation process and it will require ten per cent. of the present value of its stock to pay the expenses of this liquidation; and appellant also asked for a decree of foreclosure of the amount remaining due on the mortgage, after applying the amount paid on the stock, less ten per cent. for liquidation expenses as aforesaid. A trial was had on these issues which resulted in a decree as prayed for by appellee cancelling the mortgage. From this judgment the loan company appeals to this court.

There is no question of usury involved, so the main question presented is, what rule shall prevail in the application of payments made to a foreign building and loan association on its loan and the stock purchase? This question has been lately considered by this court in the case of *People's Building Loan & Savings Association v. Gilmore*, 1 Neb. [Unof.], 181, from which the following rules are deducible: 1st. The transaction is to be treated as a loan and the borrower has the right to have the value of his stock applied to reduce the indebtedness of the mortgage, if he so chooses. 2d. Any dividends declared or earned on the stock will inure to the borrower's credit, and this may be credited on the mortgage. 3d. The stock is to be taken as worth the amount that has been paid on it, in absence of evidence as to its actual value. 4th. Payments made on account of operating expenses and fines paid belong to the company and should not be credited on the mortgage. 5th. Payments made on the stock are not to be applied as payments on the loan until the borrower has elected to have them so applied, and credit for the value of the stock should be given at the time of such election, and not as of the date when the payments were made. 6th. Payments made for premiums and interest, if not usurious, are not to be credited on the principal of the mortgage debt.

The application of the above rules will entitle the appellee, under the pleadings and evidence of this case, to a credit of \$1,495 on his mortgage debt of the date of the last payment, viz., on March 27, 1897.



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The appellant desires to retain ten per cent. of this amount to pay the possible expense of voluntary liquidation on the part of the company. This we cannot permit it to do, for the obvious reason that there is no showing what this expense will be, and for the further reason that appellee having ceased to be a stockholder he has no further interest in the company. Nor can this expense be taken into account to reduce the value of the stock at the time of the election to surrender, as these proceedings had not then been instituted and no expense therefor had then been incurred.

Some contention arose on the trial over the question, as to whether or not the appellee took an assignment of this stock from Gillan. We think that by assuming this debt the appellee assumed the entire contract with its benefits and its burdens and it is immaterial whether or not there was any formal assignment of his stock to him. "Equity regards substance rather than form," and again, "equity regards that as done which ought to be done."

For the reasons above given we recommend that the decree of the district court be reversed and this case remanded, with directions to that court to render a decree of foreclosure on the cross-petition of the appellant for the sum of \$505 with interest at seven per cent. from March 27, 1897.

SEDGWICK and POUND, CC., concur.

The decree of the district court is reversed and this case remanded with directions to that court to render a decree of foreclosure on the cross-petition of the appellant for the sum of \$505 with interest at seven per cent. from March 27, 1897.

REVERSED WITH DIRECTIONS.

Guthrie v. State.

## GEORGE GUTHRIE V. THE STATE OF NEBRASKA, EX REL. IDA GIBSON.

FILED NOVEMBER 20, 1901. No. 10,451.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: BASTARDY: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to sustain a verdict of guilty on a charge of bastardy.
2. **Appeal and Error: ABUSE OF DISCRETION: EXCEPTION.** An alleged abuse of discretion on the part of the trial court is unavailing unless excepted to.

ERROR from the district court for Fillmore county.  
Tried below before HASTINGS, J. *Affirmed.*

*J. H. Stirling and Kelcey & Browne*, for plaintiff in error.

*Jno. Barsby and Frank W. Sloan*, contra.

ALBERT, C.

On a trial to a jury, on a complaint charging him with being the father of a bastard child, George Guthrie was found guilty. From a judgment rendered against him on such finding, he prosecutes error to this court.

It is first urged that the verdict is not sustained by sufficient evidence. We have examined the evidence with care. It would serve no useful purpose to review it. The trial resolved itself largely into a question of veracity between the complainant and the defendant. The jury decided in favor of the complainant. We are not prepared to say that their decision on that point was unwarranted. It appears that the complainant had sexual intercourse with one other than the defendant, on the night following her alleged intercourse with the defendant. It is urged that it is impossible to say which of her companions in vice is the father of the child. But it also appears that this third party took certain precautions to prevent conception,

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which were fully explained to the jury. From the evidence, we think the jury were warranted in finding that such precautions were effective.

It is urged that there was an abuse of discretion on the part of the court in permitting the plaintiff to re-open his case and offer further evidence after both sides had rested. One sufficient answer to this is, that no objection was made to the request in that behalf, nor to the ruling of the court thereon, so it is unavailable at this time, for that reason, if for no other.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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MERRICK S. PORTER V. HIRAM DETRICK.

FILED NOVEMBER 20, 1901. No. 10,462.

Commissioner's opinion. Department No. 3.

**Appeal and Error: BILL OF EXCEPTIONS: IMPROPER AUTHENTICATION.**

Where the bill of exceptions is not authenticated by a proper certificate of the clerk, this court can go no further than to see that the judgment appealed from is supported by the pleadings in the case.

ERROR from the district court for Kearney county.  
Tried below before BEALL, J. *Affirmed.*

*E. C. Dailey*, for plaintiff in error.

*Ed L. Adams*, contra.

DUFFIE, C.

The bill of exceptions in this case is not authenticated by the certificate of the clerk, and cannot, therefore, be considered by this court. We can review the case no further than to see that the pleadings support the judgment rendered.

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The plaintiff in error commenced the action to recover the possession of certain personal property alleged to be wrongfully detained by the defendant. The answer was a general denial, and several special defenses. If the defendant had stood on the special defenses alone, we have no doubt that they were insufficient, but the general denial put the plaintiff to the proof of his right of possession and entitled the defendant to a judgment in case he failed in such proof. The court and jury took the view that his evidence was not sufficient to sustain his claim, and as there is no proper bill of exceptions before us, we cannot review this finding. We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

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**J. S. GIFFORD V. FRED P. FOX, ADMINISTRATOR OF THE ESTATE OF DAVID M. SNELL, DECEASED.**

FILED NOVEMBER 20, 1901. No. 10,480.

Commissioner's opinion. Department No. 1.

1. **Bills and Notes: PAROL TESTIMONY OF CONSIDERATION.** While parol testimony may not be received to vary or contradict the terms of a promissory note, yet the considerations for which it was given may be established by parol testimony.
2. **Bills and Notes: CONSIDERATION—LANDS FOR SUPPORT: PAROL EVIDENCE.** Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement.

ERROR from the district court for Harlan county. Tried below before BEALL, J. *Reversed.*

*J. G. Thompson*, for plaintiff in error.

*R. L. Keester*, contra.

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DAY, C.

This action was brought by Fred P. Fox, administrator of the estate of David M. Snell, deceased, in the district court for Harlan county, against J. S. Gifford, to recover upon two promissory notes, each for the sum of \$300, dated April 1, 1887, and due and payable seven and eight years after date respectively. The notes were made payable to David M. Snell, and by their terms were non-negotiable. The trial resulted in a verdict returned in obedience to a peremptory direction of the court, upon which judgment was subsequently rendered, to review which the defendant has brought the case to this court on error.

But one question presented by the record needs to be considered by this court and that relates to the ruling of the trial court excluding evidence offered by the defendant tending to prove that there was an agreement between the defendant and Snell by which the former was to support the latter during his lifetime and that the notes sued upon were given by the defendant to Snell to secure the performance of the agreement on the part of the defendant and that he had performed the conditions. We think defendant's answer fairly pleaded that the land was turned over to him in consideration of his assuming certain indebtedness against it and the cancellation of certain obligations owing by Snell to the defendant and the further agreement that the defendant should support Snell during his lifetime and that the notes in question were given as a guarantee that the agreement to support Snell should be carried out in good faith.

The offered testimony was excluded upon the theory that it was an attempt to vary or contradict the terms of the notes by parol evidence. While it is the undoubted rule of law that parol evidence may not be received to vary or contradict the terms of a written instrument there are certain exceptions to the general rule which are equally well settled, one of which is that the consideration which

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supports an instrument can always be shown. *Walker v. Haggerty*, 30 Neb., 120. While the parol agreement between the parties was not admissible to vary the terms of the contract entered into, it was admissible as tending to show the actual consideration which formed the basis of the contract for which the notes were given and also to show that it had been performed.

We think that the testimony offered was proper and should have been admitted, and hold that in an action upon a note, parol evidence is admissible to show that it was given to secure the faithful performance of an agreement between the maker and the payee whereby in consideration of the transfer of certain lands by the payee to the maker the latter should support him during the remainder of his life and that the maker had fully performed the conditions.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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FRANK E. ANKENY V. VIOLET RAWHOUSER.

FILED NOVEMBER 20, 1901. No. 10,481.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: BASTARDY: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* to sustain verdict of guilty.
2. **Misconduct of Jury: DRINKING LIQUOR.** Where a jury was impaneled and trial proceeded till six o'clock with an adjournment till nine next morning, the drinking of two small glasses of lager beer in the evening, at a public saloon, and by the same juror of a whiskey glass of whiskey and blackberry brandy, mixed, about 8 o'clock in the morning, and the drinking at the latter time and place by another juror of the same quantity of whiskey, unmixed, will not of itself require the setting aside of a verdict reached on the second day.

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ERROR from the district court for Cedar county. Tried below before EVANS, J. *Affirmed.*

*J. C. Robinson, for plaintiff in error.*

The drinking of intoxicating liquors by a juror during the progress of a trial is *per se* sufficient cause for setting aside the verdict: *State v. Bullard*, 16 N. H., 139; *Leighton v. Sargent*, 11 Foster [N. H.], 119; *State v. Baldy*, 17 Ia., 41; *Ryan v. Harrow*, 27 Ia., 494; *Hopkins v. Knapp*, 92 Ia., 212; *People v. Douglass*, 4 Cow. [N. Y.], 26; *Brant v. Fowler*, 7 Cow. [N. Y.], 562; *Creek v. State*, 24 Ind., 151; *Davis v. State*, 35 Ind., 496; *Jones v. State*, 13 Tex., 168; *Pelham v. Page*, 6 Ark., 535; *Gregg v. McDaniel*, 4 Harr. [Del.], 367; *Hogshead v. State*, 6 Humph. [Tenn.], 59; *Commonwealth v. Roby*, 12 Pick. [Mass.], 496.

*W. F. Bryant and John Bridenbaugh, contra.*

The drinking of liquor by jurymen does not *per se* avoid the verdict: *Everett v. Youells*, 24 E. C. L., 681; *Thompson & Merriam, Juries*, section 378 and (7) 1, (7) 2; *Pope v. State*, 36 Miss., 121, 127; *State v. West*, 69 Mo., 405; *State v. Upton*, 20 Mo., 397; *Palmore v. State*, 29 Ark., 248; *People v. Deegan*, 88 Cal., 602; *People v. Sansome*, 98 Cal., 235; *Davis v. People*, 19 Ill., 74; *Parinton v. Humphreys*, 6 Me., 379; *Stone v. State*, 4 Humph. [Tenn.], 27, 28; *Rowe v. State*, 11 Humph. [Tenn.], 492; *State v. Caulfield*, 23 La. Ann., 148, 150; *Richardson v. Jones*, 1 Nev., at page 405; *Westmorland v. State*, 45 Ga., 282; *Larimer v. Kelly*, 13 Kan., 78; *Perry v. Bailey*, 12 Kan., 540, 546, 547; *Gilmanton v. Ham*, 38 N. H., 108; *Roman v. State*, 41 Wis., 312; *Tripp v. County Commissioners*, 2 Allen [Mass.], 557; *Russell v. State*, 53 Miss., 367; *Wilson v. Abrahams*, 1 Hill [N. Y.], 207.

HASTINGS, C.

This is a bastardy case in which but two grounds of error are urged. The first three assigned are not argued

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in the brief, and do not seem well taken. The first two relate to admission of proof of conversation between the complainant and the defendant while she was pregnant, and if true, as related by her, would furnish some evidence of defendant's responsibility. Assignment No. 3 is not good for the reason that it is simply the development of a conversation, part of which had been attempted to be shown by defendant.

The two main assignments of error are that the evidence is insufficient to support the verdict, and misconduct of the jury by drinking intoxicants. The first seems to be based, substantially, on the proposition that the evidence does not show sexual intercourse of the parties at an early enough date. Complainant swears to four acts of intercourse, which she says took place in September and October, and whose dates she cannot give; the child being born on the 3d day of June, following. Evidence was introduced by defendant tending to show that the complainant had declared that the conception took place on a certain occasion while defendant's wife was visiting in Dakota county. This visit was sought to be established as of date of October 16. The attending physician declared that the child was fully developed at birth and apparently a nine months' child. The evidence seems ample to sustain the verdict, if the statements of complainant are accepted as true, and the jury may not have relied on dates fixed by defendant. They were not absolutely bound by the physician's opinion. It cannot be said that the verdict is unsupported by the evidence.

The other question raised is as to the use of intoxicating liquors by jurors. It appears that the jury was impaneled and trial proceeded on the afternoon of December 1. It appears that after adjournment of court for the day, at some time during the evening one of the jurors in a public saloon drank two small glasses of lager beer. It appears that on the following morning about 8 o'clock, the same juror took one whiskey glass of whiskey mixed with blackberry brandy, as he says, on the recommenda-



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tion of a physician for diarrhœa, and at the same time another juror at the same place took one drink of whiskey. Court convened that morning at nine o'clock, having adjourned the previous evening at six. The question presented is simply whether from the amount of liquor used, and the time and circumstances, it can be reasonably assumed that prejudice is liable to have resulted. The industry of counsel has effectively marshalled cases on both sides, and has brought forward the *dictum* of Judge Cobb in *Vose v. Muller*, 23 Neb., 171, to the effect that the unauthorized drinking of intoxicating liquors should be held *per se* to vitiate a verdict. Precisely what was meant by the term "unauthorized" Judge Cobb did not define. In the case before us the drinking was after the adjournment of court and before the commencement of the next day's session, and would seem to be as much "authorized" as any drinking of intoxicants on the part of an individual ever is. Evidently, *Vose v. Muller* is no precedent in this case; in that one the liquor was procured by one of the parties. The tendency of such doing to disturb the partiality of jurors and the necessity to check sternly such practices has produced frequent decisions that it is sufficient to set aside verdicts. Probably the court in that case meant by "unauthorized" the procurement of liquors without the court's authorization by jurors sitting as such, either during court sessions, or in deliberation upon a case submitted. It would seem useless to discuss the numerous cases old and recent cited by counsel, only a portion of which we can claim to have examined.

In Thompson, Trials, section 2567, the conclusion is expressed that a hard and fast rule ought not to be adopted; that what is right and proper for a jurymen to do depends partly upon social surroundings and the sentiment of the community which he serves; that it is manifestly folly for a court to lay down a principle of total abstinence on the part of jurors after they are sworn, when they are drawn from a community which habitually

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and without self reproach employs such beverages. A similar expression may be found in Thompson & Merriam, Juries, section 378. The conclusion reached by Judge Thompson, in the section above cited, is: "The mere fact that a jury, pending the trial, or while deliberating on the verdict, drink intoxicating liquor, without more, will not be sufficient ground for a new trial." This goes somewhat further than is necessary to affirm the case before us. It is not in harmony with the *dictum* in *Vose v. Muller*, above mentioned, but seems amply supported by the weight of authority. At all events it does not seem either necessary or desirable to stretch judicial authority further even than is done in Iowa, and say that any drinking of intoxicants even during an adjournment and in quantities not at all liable to produce intoxication will vitiate a verdict.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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AUGUST WENTZ V. FRED MEYER.

FILED NOVEMBER 20, 1901. No. 10,509.

Commissioner's opinion. Department No. 3.

**Appeal and Error: TRANSCRIPT: ATTACKING SUFFICIENCY OF.** Except upon direct attack by motion assailing its sufficiency or accuracy, a transcript of the record of a district court transmitted to this court on error or appeal, imports absolute verity, and alleged errors and imperfections therein will not be corrected upon the oral representation of counsel made at the time of the submission of the case.

ERROR from the district court for Richardson county. Tried below before STULL, J. *Reversed.*

*C. F. Reavis* and *Edward Falloon*, for plaintiff in error.

*F. Martin*, contra.

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AMES, C.

This cause comes here on a petition in error, and was submitted on a brief without oral argument by the plaintiff in error alone. One of the errors complained of is, that the court instructed the jury that a certain matter touching the controversy was agreed upon between the parties, but that in fact there is no admission of such an agreement in the pleading, and its existence is one of the matters about which there is a conflict in the evidence. The record supports the contention of the plaintiff in error, but counsel for the defendant in error, by permission, made a statement at the time the case was submitted in this court, to the effect that the paragraph complained of is mistakenly included among the instructions, and that it is in fact a copy of a stipulation made by the parties in the district court, before the case was submitted to the jury. There are indications in the record of considerable weight, which tend to support this representation, but we think we are bound by the explicit statement of the transcript that the paragraph was given by the court of its own motion as an instruction to the jury. We do not think this court would be justified in not only striking the paragraph from the list of instructions, but in giving it force as a stipulation, upon the oral representation of counsel for one of the parties, made in the absence of his adversaries, at the time of the submission of the case. A refusal so to do is, of course, no reflection upon the credibility of counsel, but the court, we think, is without power to adopt such a course. The imperfection of the record, if any, should have been corrected by other means, at an earlier day. In its present condition it imports absolute verity, and must receive the treatment due to that character. So treated, the error complained of is apparent, and a reversal is inevitable.

We recommend that the judgment of the district court be reversed and a new trial awarded.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Carlson & Hanson v. Holm.

CARLSON & HANSON v. K. B. HOLM.

FILED NOVEMBER 20, 1901. No. 10,511.

Commissioner's opinion. Department No. 1.

1. **Challenge to Juror: GROUNDS.** Overruling of challenge on the ground that a talesman called had served on a former case at same term, *held*, no error.
2. **Evidence: STATEMENTS OF PARTIES: ADMISSIBILITY.** Statements of parties directly relating to the issues are admissible on behalf of the opposing party as independent testimony.
3. **Examination of Witnesses: LEADING QUESTIONS.** Permitting certain leading questions, *held*, not reversible error under the circumstances.
4. **Cross-Examination of Witnesses: IMMATERIAL POINT.** Not error to refuse to permit cross-examination as to transactions not expressly mentioned by witness in chief and which were not strictly material to the case.
5. **Cross-Examination of Witnesses: LIMITATION OF: REPETITION.** Limiting cross-examination where no further unanswered question is tendered and the testimony sought would be repetition, not error.
6. **Appeal and Error: INSTRUCTIONS: NON-PREJUDICIAL.** Giving and refusing of instructions in the case *held* to show no prejudicial error.

ERROR from the district court for Saunders county.  
Tried below before BATES, J. *Affirmed.*

*John L. Sundean and Good & Good*, for plaintiffs in error.

*V. L. Hawthorne, contra.*

HASTINGS, C.

The error most extensively discussed in the briefs of attorneys in this case is the overruling of the challenges against the jurors, Krumpus and Dietz, because they were talesmen who had served as such in a former trial at the same term.

Section 665, of the Code, that no person shall be called

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as juror more than once in two years, and shall be subject to challenge if he has been summoned as a juror at any term of court held within two years prior to said challenge, is cited by plaintiffs in error as excluding such jurors. An energetic argument is made as to the evils of permitting talesmen to serve through the term, but however this may be, it does not seem that the practice is forbidden by the statute in question. A term of court not yet finished at the time the juror is called, certainly cannot be said to have been held within two years prior to his calling. Evidently a portion of the term was held after such calling, enough of it, at least, to result in the verdict and judgment sought to be reversed. As the prohibition relates only to prior terms, it seem clear that it could not have been intended to refer to one then present and in progress.

Error is predicated also in assignments Nos. 4 and 5, upon the admission of testimony as to what one of the plaintiffs had said about getting a new machine. The statement in question related directly to the question at issue, viz., the quality of the machine for which the note in suit was given, the work that it would do, and the nature of plaintiffs' obligation in reference to it. It was competent evidence as an admission against interest on the part of one of the plaintiff partners.

The 7th assignment of error relates to the permitting of leading questions to be asked defendant, Holm, by his counsel. The questions relate to the work of the machine. The defendant testifying in his own behalf said in response to the question, as to what seemed to be the particular trouble with the machine, that he could not tell; he was then asked and permitted to answer over plaintiffs' objection, whether it clogged up, and his reply was, "Yes, sir." He was then told to go on and tell the jury about its clogging, and answered, "clogged up and they could not operate the machine and bind and elevate and so on, stopped the whole thing."

"Q. Seemed to be some trouble about elevating?"

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Objected to as leading and suggestive, and overruled.

"A. Seemed to be trouble all over."

"Q. Did it seem to have any trouble in elevating the corn and throwing it back into the rocker?"

Same objection as above.

"A. Yes."

"Q. Did it seem to have any trouble in binding the corn?"

Same objection.

"A. Yes, sir."

This is, to say the least, a very suggestive examination of a party to the suit. The party, however, seems to have had some difficulty in expressing himself in English, and it is not clear that there was an abuse of discretion in permitting it.

The next error is alleged to have been in refusing permission to cross-examine the defendant as to his refusal to permit the trial of the machine in other fields. Of course, cross-examination as to a conversation, a part of which has been given by a party, must be allowed to the extent of the entire conversation, unless the matter elicited is clearly unconnected with the merits of the case. In this instance, however, the question seems to relate to independent transactions between the witness and the company, to which he had not testified in chief, and which were quite distinct from the trial of the machine to which he had testified. The occurrences inquired about seem to have happened after the return of the machine and after the rights of the parties in this action had been fixed. No abuse of discretion in refusing this cross-examination appears. The same is true as to the 8th assignment of error.

The 9th assignment of error in peremptorily stopping the cross-examination of a witness does not appear from the record to have been an abuse of discretion. The cross-examination had proceeded at great length and involved many matters not material to the issue, and no question was tendered as to which the plaintiff required further information.

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Error is urged in permitting the introduction of proof as to the contents of a telegram. The original writing appears to have been destroyed. The objection urged is that insufficient foundation was laid, and seems not to have been well taken.

Assignment No. 11 has already been disposed of in connection with Nos. 6 and 7. Assignments Nos. 12 and 13, with relation to the testimony of witness Burklund, are not well taken. They are based upon his statement that he did not personally know of corn being cut by this machine in his field. It appears that corn was cut in his field with this machine, and his testimony is simply that it was badly bound and in irregular bundles. The same remarks apply to assignment No. 14. Assignments Nos. 15, 16, 17 and 18, like assignment No. 3, are not urged in the brief, and will be deemed waived.

The remaining assignments relate to the giving and refusing of instructions. The complaint as to instruction No. 1, given at the request of defendant, that it was upon matter not put in issue by the pleadings, cannot be sustained in view of the allegations in the answer and the proof introduced under it without objections on that ground. The allegations of the answer are in effect that in delivering this written guarantee, as to the work of this corn cutting machine, of the McCormick company, plaintiffs also made it their own by a verbal agreement. The instruction, therefore, is to be regarded simply as one defining what would amount to sufficient evidence of such an agreement on the part of plaintiffs, and was, we think, applicable to both the pleadings and the evidence. It merely told the jury that one party to an agreement is bound by the meaning which he intends the other to get from it, if the other gets that meaning, even though he himself intends at the time to claim a different one.

With regard to instructions requested by plaintiff and refused, No. 1 seems to be amply covered in the 3d requested by plaintiffs and given by the court. No. 2, refused, seems to have been amply covered by Nos. 5 and 6

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requested by plaintiff and given by the court. The 3d instruction, if it is correctly given in the transcript, was properly refused in plaintiffs' own interest. With regard to No. 4, refused, to the effect that there was no liability on plaintiffs, if the failure of the machine to operate was the result of defendant's fault, we are not pointed out any evidence in the record on which such an instruction could be based, and with regard to No. 5, its giving would have been a mere repetition of the general instructions which had been given by the court at least twice.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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THOMAS COFFIELD, APPELLEE, V. ALEXANDER H. PARMENTER  
ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,512.

Commissioner's opinion. Department No. 1.

1. **Creditors' Suit: AFTER EXECUTION RETURNED.** The return of a sheriff upon an execution *nulla bona*, which has not been successfully impeached in a direct proceeding, is a sufficient basis for the maintenance of a creditor's bill, and the defendant can not in such suit question the truth of the return for the purpose of showing that the plaintiff has not exhausted his legal remedies.
2. **Vendor and Purchaser: FRAUD: KNOWLEDGE BY GRANTEE.** Evidence examined, and *held* to sustain finding of trial court that the grantee was charged with knowledge of the fraudulent purpose of his grantor in making the deed.

APPEAL from the district court for Saunders county.  
Tried below before SEDGWICK, J. *Affirmed.*

*Brown & Sumpter*, for appellant, A. H. Parmenter.

*H. Gilkeson* and *Lamb & Adams*, for appellee.

*Good & Good*, for B. F. and Cora Parmenter.



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KIRKPATRICK, C.

This is a suit in the nature of a creditors' bill brought in the district court for Saunders county on May 6, 1897, by Thomas Coffield against Alexander H. Parmenter and his wife, Benjamin F. Parmenter and his wife, and the Union Central Life Insurance Company, to set aside a conveyance of certain land in Saunders county made by Alexander H. Parmenter and his wife on October 27, 1895, to Benjamin F. Parmenter, their son. The petition alleges that the conveyance was made wholly without consideration, and for the purpose of placing the property beyond the reach of the creditors of the grantor, A. H. Parmenter; and that B. F. Parmenter, the grantee, had full knowledge of the fraud at the time he accepted the conveyance. B. F. Parmenter and his wife answered, pleading that they purchased the land in good faith for value and without any notice of the insolvency of A. H. Parmenter, and without any knowledge of or participation in the fraud; and in addition, pleaded that A. H. Parmenter owned real estate in Bethany and also in Cheyenne county, Nebraska, and that he owned a large amount of stock in the Bethany Manufacturing Company, a corporation, and that from this property Thomas Coffield could make the amount due on his judgment if he so desired. To these answers a reply was filed by Coffield, pleading that the property in Bethany owned by A. H. Parmenter was his homestead and exempt from execution, and that the Bethany Manufacturing Company was bankrupt and insolvent, and its stock worthless, and denied that A. H. Parmenter owned lands in Cheyenne county of any value. Trial was had, which on June 15, 1898, resulted in a finding and judgment in favor of Coffield, appellee, cancelling and setting aside the deed by A. H. Parmenter and wife to B. F. Parmenter, and decreed the property subject to execution for the satisfaction of Coffield's judgment. From this judgment all the Parmenters appeal to this court.

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The facts disclosed by the evidence, briefly stated, are as follows: Some time prior to 1894, A. H. Parmenter was the owner of the title to the land in controversy in Saunders county, which was free of incumbrances. He removed to the village of Bethany, Lancaster county, for the purpose of educating his children and rented the farm in question. After he removed to Bethany he became the president of the State Bank of Bethany. The bank became somewhat involved, and in the latter part of 1894, he, together with Louis M. Thomas, J. B. Briscoe, N. W. Henderson, C. P. Lomax, and others, officers and stockholders of the bank, executed to Thomas Coffield a note, on which, on February 28, 1896, judgment was rendered in the Lancaster county district court for \$1,076.65. An execution was issued on this judgment, and on May 24, 1896, it was returned unsatisfied, and on September 3, 1896, a transcript of the judgment was filed in the district court of Saunders county, and on November 2, of that year, an execution was issued thereon, which was likewise returned by the sheriff unsatisfied for want of property upon which to levy. About a year before this, and on October 27, 1895, Alexander Parmenter and wife conveyed the land in question to B. F. Parmenter, who paid on the purchase price \$75 in money, and he and his wife executed notes for the remainder of the purchase price, the notes drawing interest at the rate of six per cent. per annum, the first note being in the sum of \$925 and the remainder for one thousand dollars each. In the meantime, and just about a week before this deed was made, the State Bank of Bethany failed, and it appears that A. H. Parmenter, in trying to keep the bank running, had become very badly involved.

The only question requiring consideration in this case is one of fact. It is claimed by appellants that there is no evidence in the record tending to show that B. F. Parmenter, at the time he took the conveyance of the land in question, had knowledge of his father's insolvency, or tending to show that he participated in his father's

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fraudulent purpose to put the land beyond the reach of his creditors. B. F. Parmenter testified that he had no knowledge of his father's insolvency, and that he did not know that the State Bank of Bethany had failed. A. H. Parmenter was not called as a witness. It appears that B. F. Parmenter had rented the place of his father, and had been living on it nearly a year at the time of his alleged purchase. The testimony shows that he owned but a small amount of personal property, and that his wife was not possessed of any means; that the only sum he paid down for the land was the sum of \$75; that the notes he gave were secured only by the signature of his wife. Not even a mortgage upon the land was given as security. Up to the time of the commencement of this suit it seems that B. F. Parmenter had paid \$2,500 on the purchase price of the farm. But this money it appears he obtained by executing a mortgage on the place to the Union Central Life Insurance Company.

The burden of proof in this case, according to a well established rule, was upon appellants. From a careful reading of the testimony, it very clearly appears that B. F. Parmenter must have known of the insolvency of his father at the time he took title to the premises, and from all the circumstances in the case, as disclosed by the evidence, we think the finding of the trial court that B. F. Parmenter was influenced and controlled by his father in the transaction, and that the land was conveyed to him without consideration, and without financial ability on his part to pay for the same, is sustained by the evidence; and he must be held to have had notice that his father's purpose was to place the land beyond the reach of his creditors. The trial court heard the evidence and so found, and we are unable to say that the finding is not supported by sufficient competent evidence.

It is contended by appellants that the testimony does not show that an execution had been issued upon the judgment and returned unsatisfied for want of property, and

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that A. H. Parmenter did in fact have property subject to execution. The evidence discloses that an execution was issued and returned unsatisfied in Lancaster county, and that after the transcript was filed in Saunders county an execution was issued thereon and likewise returned unsatisfied. It also appears that the property owned by A. H. Parmenter in Bethany was a homestead, and therefore exempt as such, and that the Bethany Manufacturing Company was insolvent, and its stock worthless. The evidence does not disclose whether or not A. H. Parmenter owned land of any value in Cheyenne county; but however that may be, the rule is settled that the return of the sheriff on an execution *nulla bona* is conclusive of the question that the creditor has exhausted his legal remedies and is entitled to maintain his bill. "The general rule is, that a court of equity will not interpose until the creditor has exhausted his remedy at law; and a judgment recovered and an execution issued thereon and returned unsatisfied are ordinarily required, and are considered the best evidence that the remedy at law does not exist." *Weaver v. Cressman*, 21 Neb., at page 678.

In *Baxter v. Moses*, 52 Am. Rep. [Me.], at page 785 the rule is announced as follows: "His (the debtor's) inability or unwillingness to pay should be established by some certain rule. What more reasonable one could be devised than that there shall be a judgment, an execution and a return of *nulla bona*? And to remove all uncertainty, the official return is conclusive evidence that the creditor has exhausted all legal remedy without succeeding in collecting his debt. It is a beneficent rule for both parties," citing many cases. See *Bates & Company v. Cobb*, 13 Am. St. Rep. [S. Car.], 742, to the same effect.

The authorities cited by appellants no doubt correctly state the law, but under the facts in this case, as found by the trial court, they do not control and have no application. It follows from what has been said that the findings and judgment of the trial court are right, and it is

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therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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LIND NELSON, SHERIFF OF GAGE COUNTY, v. THE CITY OF  
BEATRICE, NEBRASKA.

FILED NOVEMBER 20, 1901. No. 10,529.

Commissioner's opinion. Department No. 2.

1. **Judicial Sales: REVERSAL OF JUDGMENT: RESTITUTION, WHO MAY DEMAND.** Where a judgment creditor purchases property at an execution sale on a judgment which is subsequently reversed, it is his duty to make restitution of the property, so purchased, to the judgment debtor after the reversal of the judgment; but the right to demand restitution is confined to the judgment debtor or his privies and can not be invoked by an attaching creditor of such judgment debtor.
2. **Attachment Against Resident of State But Not of County: VALIDITY OF LIEN.** Where an attachment proceeding is instituted against a defendant, who is a resident of this state, in a county in which such defendant does not reside and cannot be found, and makes no appearance, a levy on a judgment rendered on such proceeding is not a valid lien on the property of the defendant in the county in which such judgment was rendered.
3. **Replevin: AGAINST TRESPASSER: QUÆRE.** Whether one in peaceful possession of personal property, and with no stronger title, may not maintain replevin against a trespasser who disturbs his possession, *quære*.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed*.

*E. O. Kretsinger*, for plaintiff in error.

*W. C. Dorsey* and *F. N. Prout*, *contra*.

OLDHAM, C.

This is an action in replevin instituted by the city of Beatrice against Lind Nelson, as sheriff of Gage county, Nebraska, to recover certain personal property in the petition described. The jury was waived by the agree-

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ment of the parties and the cause was submitted to the court upon an agreed statement of facts. The material facts agreed upon were: That the property in dispute had been levied upon and sold under an execution on a judgment which the city of Beatrice had procured against the firm of Godfrey & Meals in the district court for Gage county, Nebraska; that the city of Beatrice had purchased the property at this execution sale; that the judgment under which this execution sale was had was subsequently reversed by the supreme court of the state of Nebraska; that after the reversal of this judgment, the Smeadly Steam and Pump Manufacturing Company commenced a suit in attachment against the firm of Godfrey & Meals in the district court for Gage county, Nebraska; that at the time this suit was begun neither of the defendants was a resident of Gage county, Nebraska, but each was a resident of the state of Nebraska, one of the members of the firm residing in Holt county and one in Douglas county, Nebraska; that each of these defendants was served in the attachment proceeding in the county in which he resided, but neither of them appeared for any purpose in this action. It further appears, from the agreed statement of facts, that this attachment suit was prosecuted to judgment in Gage county, Nebraska, and that the city attorney of the city of Beatrice filed a motion, supported by his affidavit, in said suit after judgment asking that the attached property be released and alleging that it belonged to the city of Beatrice. It also appears that this motion was denied and that no appellate proceeding was taken to review the order of the court denying this motion. It also appears that the defendant sheriff levied on the property in dispute as the property of Godfrey & Meals under this attachment proceeding. On this agreed statement the court below found the issues in favor of the plaintiff and the defendant brings error to this court.

The chief contention of defendant's counsel is that the plaintiff, under the agreed statement of facts, fails to show any title in itself to the chattels in dispute and that under

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the doctrine approved by this court that "the plaintiff in replevin must rely on the strength of its own title and not on the weakness of the title of its adversary," he, the defendant, was entitled to judgment in the court below. His theory is that plaintiff having purchased the chattels at an execution sale on a judgment in which it was the judgment creditor, and Godfrey & Meals the judgment debtor, that immediately on the reversal of this judgment by the supreme court the title to the chattels, so purchased, revested in the judgment debtor, Godfrey & Meals, and that plaintiff was entirely divested of all property interest in and right of possession to the chattels in dispute, because of the reversal of said judgment.

We do not doubt the proposition that when a judgment creditor, or one for him, purchases property at an execution sale on his judgment and his judgment is subsequently reversed and set aside by a superior court, it is then incumbent on him to make restitution of the property, so purchased, to the judgment debtor, or to account to such judgment debtor for the value of the property, so purchased, but, we think, the right to demand this restitution is confined to the judgment debtor and his privies and that it cannot be invoked by the attaching creditors of such judgment debtor. While this question has never been definitely settled in an adjudged case by this court, yet, we think, this rule is well founded in principle and fully sustained by the authority of other courts.

In the case of *McAusland v. Pundt*, 1 Neb., 211, CROUNSE, J., speaking for himself alone, expressed the opinion that the judgment creditor who purchases at an execution sale should take title to the property, so purchased, as a stranger would, entirely unaffected by a subsequent reversal of the judgment, but, we think, that this is extending the rule too far and is in conflict with the great weight of authorities on this subject. *McBain v. McBain*, 15 Ohio St., 337; *Gott v. Powell*, 41 Mo., at page 420; *Sheldon v. Pruessner*, 35 Pac. Rep. [Kan.], 204; *Stroud v. Casey*, 25 Tex., 740.



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The case of *Gould v. Sternberg*, 128 Ill., 510, 21 N. E. Rep., 628, is well considered and, we think, its reasoning governs the point at issue in this case. It says: "It is well settled in this state that when property of a defendant has been sold on a judgment afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof, but the title to the property, in that case, is unaffected by the reversal. No one but the defendant or his assignees can take any advantage of such reversal, and there can be no question but that he may waive that right, or, if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal. A sale or execution, based on a judgment afterwards reversed, is not, therefore, we conclude, absolutely void, but voidable only, at the election of the owner of the property sold."

It is not seriously contended by counsel for the defendant that the attachment proceedings, set out in the stipulation, gave the defendant sheriff any valid lien on the chattels in dispute; in fact, in view of the decision of this court in the case of *Hoagland v. Wilcox*, 42 Neb., 138, it would be useless to base any claim of a lien on a judgment rendered on this attachment proceeding, for it clearly appears from the record that each of the defendants were residents of the state of Nebraska at the time that this proceeding was instituted. It also appears that neither of the defendants resided in nor could be found in Gage county at the time suit was instituted; and it also appears that neither of the defendants appeared in the attachment proceeding. Under this condition of the record the judgment in the attachment proceeding was clearly void and constituted no lien on the property of Godfrey & Meals situated in Gage county. It follows then that when the defendant sheriff took the property in dispute under a pretended levy on this void judgment he took it as naked trespasser.

Defendant, however, seems to contend that the action of the district court of Gage county in overruling the



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motion filed after judgment in the attachment proceeding by the city attorney of Beatrice, as set out in the stipulation, was an adjudication of the city's title to the chattels in dispute and that the city is now bound by such adjudication, because it failed to prosecute error therefrom; but as we have already seen the judgment in the attachment proceeding was a mere nullity and hence no one is bound by it. Again, the city was not a party to this suit, and never asked any leave to file an intervening petition to assert its rights before judgment and the action of the trial court in refusing to hear it on motion to discharge the attached property after judgment could in no event amount to an adjudication of its title to the attached property.

In the case at bar it clearly appears from the stipulation on which this case was tried that each of the litigants claimed title to the chattels from the same common source, that is, from Godfrey & Meals. The city claims under its purchase at execution sale on a judgment subsequently reversed; its possession when taken was a rightful possession and its title was good and valid against all the world until the reversal of the judgment under which it held, and then, if our reasoning in this opinion is right, it was still good against everyone except Godfrey & Meals and their privies; and there is no claim made that Godfrey & Meals have ever asked for a restitution of this property from the city. On the contrary, the claim of the defendant is that of a trespasser in possession; and if the case rested solely on the question of the right of one in peaceful possession of personal property and with no other title we would hesitate to say that even this kind of a title would not prevail in a suit in replevin against a trespasser who had disturbed his possession. Such a doctrine as this has been asserted by high authorities in actions for the recovery of real property where the same maxim applies that defendant relies on in this case. *Christy v. Scott*, 14 How. [U. S.], 292; *Hubbard v. Little*, 9 Cush. [Mass.], 475; *Swift v. Agnes*, 33 Wis., 228; *Pettingell v.*

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*Boynton*, 139 Mass., 244. If this rule applies in actions for the possession of real estate why not in actions for the possession of chattels?

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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HARGADINE MCKETTRICK DRY GOODS COMPANY ET AL., APPELLEES, v. HARRY R. KRUG ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,530.

Commissioner's opinion. Department No. 3.

**Principal and Agent: EFFECT ON PRINCIPAL OF NOTICE TO AND KNOWLEDGE BY AGENT.** Notice to or knowledge by an agent is imputed to his principal in those cases only in which it is his duty to act upon it, or to communicate it to his employer, in the proper discharge of his trust as such agent, and it possesses that character in those cases only in which it has a direct relation to the act or business which the agent is employed to do.

APPEAL from the district court for Box Butte county. Tried below before WESTOVER, J. *Reversed and dismissed.*

*Chas. E. Magoon*, for appellants.

*A. C. Ricketts, H. H. Wilson and Geo. E. Hibner*, contra.

AMES, C.

During the time of the happening of the transactions hereinafter related, Harry R. Krug lived at Lincoln, Nebraska, and his brother Frederick V. Krug lived at New York City, N. Y. Harry owned a tract of land, situate in Box Butte county in this state, of which he negotiated a sale to Frederick, for the price of \$2,500. On the 24th or 25th day of March, 1895, he applied to Mr. Charles E. Magoon, an attorney at law in Lincoln, and consulted him concerning effecting a conveyance of the land to the purchaser, saying that the latter "desired to know that the

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deed was properly executed according to the requirements for conveying real estate in Nebraska," and that he, Harry, had mentioned Magoon's name to his brother, who desired the latter "to make out the deed, see that everything therein was right, put it on record for him and (after recording) send it to him at New York City." Magoon learned from Harry the correct description of the land, and wrote the deed, and after its execution sent it to Box Butte county to be recorded, where it was received and filed on March 27th. Shortly afterwards the deed having been recorded, was returned by the county clerk through the mails to Magoon, who immediately sent it in like manner to Frederick Krug in New York. Upon receipt of the instrument, Frederick remitted the purchase price to Harry by means of a draft, payable to the order of the latter. The purpose of Harry in this transaction, which he afterwards accomplished, was to defraud his creditors out of the land or of the proceeds of its sale. Knowledge of this purpose came to Magoon, after the deed had been sent to Box Butte county for record and apparently before its return therefrom, but certainly before it was sent to New York. The purchaser was, and remained, ignorant of Harry's financial condition, and of his fraudulent intent, until long after he had received and accepted the deed and paid the purchase price.

This is an action in the nature of a creditors' bill by certain creditors of Harry, to set aside the conveyance of the land to his brother and subject it to the payment of their judgments. The suit was tried to a referee, who found the facts substantially as above stated except that he found that Magoon was the agent of the purchaser, Frederick V. Krug, in the transaction, without a description of the nature or purpose of the agency, or the scope of the agent's employment or the extent of his authority. As a conclusion of law the referee found "that knowledge on the part of said Magoon, of facts sufficient to put him on inquiry touching the intent of said Harry R. Krug, amounted, under the circumstances, to notice of such

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intent, and that his principal, the defendant Frederick V. Krug, is chargeable therewith"; and he therefore recommended that the prayer of the petition of the plaintiff be granted, the conveyance set aside as to them, and the land subjected to the payment of their claims. The report was confirmed by the court and a judgment entered accordingly, from which the defendants appeal.

If the referee's findings of fact are supplemented by the undisputed evidence respecting the scope and nature of Magoon's employment, the above mentioned conclusion of law is erroneous. It is a harsh and severe rule which imputes to a principal the knowledge possessed by his agent, and oftentimes, as in the case at bar, punishes an innocent party for the participation in a transaction of which he was concededly ignorant. It was adopted, not as adapted to secure the ends of justice in all cases, but as a concession to the weakness of the powers of discernment of human tribunals. The principle is too firmly established to be shaken, and its wisdom is not doubted, but as it is not infrequently the cause of rank injustice, its operation should be rigidly confined to those cases to which it is strictly applicable. The reason of the rule, and some of its principle limitations, are well stated by Mr. Justice Bradley in the case of *The Distilled Spirits*, 11 Wall. [U. S.], 356, as follows:

"The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principle the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for the former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret

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and confidential information. This often happens in the case of large cities in England, where men of great professional eminence were frequently consulted. They thus become possessed, in a confidential manner, of secret trusts and other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients."

Consistently with this view the knowledge of an agent, in order to be binding upon his principal, must be not only such as he possessed during the time of his employment, but such as related to his duties in such a way as that if it was known to the principal, it would affect the conduct of the latter in doing the very act, or transacting the very business which the agent was engaged to do. Now it is clear that the knowledge of Magoon as to the intent of Harry Krug in making the conveyance in question, could not have affected his conduct, or even that of his principal, in preparing a deed of the land, seeing to it that it was properly recorded and sending it by mail to New York. He was not consulted as to the value of the land, the sufficiency of the title, the sum to be paid for it, the propriety of making the purchase or accepting the deed, nor had he any duty to perform with respect to any of these matters, and for him to have volunteered any information or advice on any of these subjects to Frederick Krug, would have been merely an impertinence. Discussing this rule in *Trentor v. Pothen*, 46 Minn., 298, 49 N. W. Rep., 129, the court per Mitchell, J., say:

"But while this rule may be a salutary and just one, if properly applied, it would be a very dangerous one if applied without proper discrimination. Hence the tendency of the courts is rather to restrict the doctrine of imputed notice, or at least, not to extend it, but to reduce it within clear and definite principles.

"The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has

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authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions: Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency. In this case it appears from the evidence that the agency was special, and limited to examining an abstract of title, and from that giving the intervener an opinion as to the sufficiency of defendant's title. In other words, it was the ordinary case of the employment of an attorney to examine the record title, and give an opinion whether or not it is good. We do not suppose it was ever understood that it was within the scope of the agency of an attorney, under such circumstances, to go beyond the record evidences of title, and make inquiry of people generally for information as to facts that might affect the title."

Upon the same principles are *Sandberg v. Palm*, 53 Minn., 252, 54 N. W. Rep., 1109; *Congar v. The Chicago & N. W. R. Co.*, 24 Wis., 157, and *Hinton v. Insurance Co.*, 63 Ala., 488. The rule is, that notice to an agent whose duty it is to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal. *The Fulton Bank v. The New York & Sharon Canal Co.*, 4 Paige Ch. [N. Y.], 127. It is to be observed that the breach of duty of which, in an action like the case at bar, the law conclusively presumes the agent not to have been guilty, is a breach of a duty owed by him not to third persons but to his principal. It would seem to be a corollary of this, that if he does in fact commit such a breach, in consequence of which his principal suffers loss, the latter is en-

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titled to call upon him to respond in damages. It is a general rule of law that "it is the duty of the agent to give to his principal reasonable and timely notice of every fact coming to his knowledge in reference to his agency, and which it may be material for the principal to know in order for the protection or preservation of his interests." Meachem, Agency, section 538, and cases cited. It apparently follows from this rule that the suppression of the knowledge of facts which were sufficient to deprive the principal of the very property which the agent was employed to assist in purchasing, would fix upon the agent this liability. But before the agent can be held to have incurred this responsibility it must, we think, be established that he was entrusted with the conduct of some matter pertaining to the negotiation or bargain or agreement of the purchase itself, and that it is not sufficient that he was employed to do some act or series of acts, clerical in their nature, and calling for the exercise of no judgment or discretion with respect to the real business in progress.

It is therefore recommended that the judgment of the district court be reversed and the action dismissed.

DUFFIE and ALBERT, CC., concur.

REVERSED AND DISMISSED.

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UNION CENTRAL LIFE INSURANCE CO., APPELLEE, v. HERBERT BAKER, APPELLANT, ET AL.

FILED NOVEMBER 20, 1901. No. 10,532.

Commissioner's opinion. Department No. 3.

**Judicial Sales: OBJECTION TO APPRAISER: WAIVER.** Where an appraiser called by the sheriff to appraise real estate ordered sold under a decree of foreclosure is disqualified to act, and such disqualification is known to the defendant at or prior to the appraisement, he can not lie still until after the sale is made and urge such disqualification as an objection to the confirmation of the sale.



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APPEAL from the district court for Custer county. Tried below before GRIMES, J. *Affirmed.*

*J. R. Dean*, for appellant.

*A. B. Coffroth, Alpha Morgan and Flansburg & Williams, contra.*

DUFFIE, C.

This is an appeal from an order confirming a sale. The only objections that demand examination are, that one of the appraisers was neither a freeholder nor a resident of the county, and that the appraisement was too low. No objection to the appraisement was made until after the sale nor until order to show cause against confirmation was entered. The difference in the value of the property as fixed in the affidavits filed by the appellant, and that found by the appraisers, is not so great as to call on us to interfere with the order of the court in confirming the sale. There is no showing made by the appellant that he was not fully informed of the claimed disqualification of one of the appraisers long prior to the sale, indeed, the only evidence offered of such disqualification is the affidavit of the appellant himself whose statement relates to facts within his knowledge long prior to the date of the appraisement. If he knew the appraiser to be disqualified, he should not have waited until after the appellee had gone to the expense of advertising and selling the land before making his objection known. The sheriff, in his return, certified that this appraiser was a resident freeholder of the county, and the appraiser himself might be subjected to an examination if there was any doubt as to his qualification to act.

We do not think we ought to interfere with the finding of the district court under the facts disclosed by the record, and therefore recommend that the decree of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.



Van Etten v. Flannagan.

EMMA L. VAN ETTEN ET AL V. JULIA FLANNAGAN ET AL.

FILED NOVEMBER 20, 1901. No. 10,536.

Commissioner's opinion. Department No. 1.

**Appeal and Error: DAMAGES: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* not to sustain a finding of damages against defendant, Emma L. Van Etten, for deceit and misrepresentation.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Reversed.*

*David Van Etten*, for plaintiffs in error.

*B. E. B. Kennedy* and *Charles W. Haller*, contra.

HASTINGS, C.

This action was begun by defendants in error to recover the sum of \$2,000 for alleged damage for having been fraudulently induced to sign a note. Plaintiff and her husband are both totally illiterate and allege that they were induced by representations of defendants, David Van Etten and wife, that the note was for only \$100, to assent to and sign a note for \$512, jointly with Emma L. Van Etten, his wife, in favor of John W. Howell. This note appears to have been indorsed by the payee, and action was brought upon it in the name of Edward E. Howell; judgment was recovered, and levy was made upon real estate of the plaintiff, which she says was worth \$2,000, and which was sold and the proceeds applied in satisfaction of the judgment. Plaintiff alleges that the note was executed by her in full reliance on defendants' representations that it was for only \$100 and with full knowledge on the part of defendants of such reliance. Damages are alleged at \$2,000, the value claimed for the real estate, and judgment asked for that sum and costs.

The defendants first deny all the allegations not expressly admitted; say that the defendant, Emma L. Van Etten, through her husband, David, the other defendant,

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applied to plaintiff and her husband for a payment of \$325 on an alleged indebtedness for legal services due from the Flannagans to David Van Etten; that the Flannagans not being able to raise that much money agreed to give a note by which means it could be raised; that one was given for \$450 and discounted to one William Gibson for \$325; that both the plaintiff and her husband, John Flannagan, were informed of the contents of the note and fully understood it, and it was executed with the assistance of J. W. Williams, who signed as a witness; that defendants were informed a few days later by J. W. Howell that he had purchased said note for \$425, and Howell desired the defendants to substitute another note drawing interest from date instead of from maturity, as the first one read; that defendant, Van Etten, arranged then with Howell to give another note with the interest clause changed, if it might be renewed from time to time until the decision of a certain case in this court; that Howell agreed to that arrangement and the new note to Howell was executed for \$485, with Williams again as witness, and after the two Flannagans had been fully informed of the precise transaction. This note was not paid when it matured, and the answer alleges that the note on which suit is brought was given as a renewal of it under the agreement, David Van Etten and T. M. Wetmore signing as witnesses. The last note was sued and the judgment complained of by plaintiff recovered upon it. The defendants also allege that the real estate sold under the agreement was the homestead of John and Julia Flannagan and not subject to such sale, and any damages suffered by them on account of its sale were the result of their own negligence. Defendants also say that the property, while it stood in the name of Julia Flannagan, was really the property of John Flannagan, and that he is the real party in interest; that he signed the notes as one of the makers, and they claim the cause of action is barred by the statute of limitations. The rest of the answer contains

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a counter-claim in the shape of an account to the amount of \$8,000 against John and Julia Flannagan in favor of David Van Etten for services as attorney and for expenses incurred on their behalf. At the close of plaintiffs' testimony in chief defendant, Emma L. Van Etten, moved for an instruction to find in her favor, which was refused. Trial resulted in a verdict for the plaintiff against Emma L. Van Etten for the sum of \$2,000, dismissal having been entered by plaintiff as to David Van Etten. On this verdict judgment was entered, and to reverse it this action is brought.

Plaintiff in error does not seem to argue any specific error in the brief, except the general one that the verdict is contrary to the evidence, and misconduct of the jury. It is complained that the instructions are wrong, but no specific error is pointed out in the brief. The evidence is entirely conflicting, the plaintiff and her husband swearing positively to the misrepresentations by David Van Etten, and he as strenuously denying them. Extensive employment of defendant, David Van Etten, by John Flannagan at all events, if not by the plaintiff, is shown, but it is claimed that the services had been paid in full before the commencement of this action. Considerable payments are admitted, but a recovery on account of numerous items of professional employment and expenditures was sought by the defendant, but was negatived by the verdict of the jury. The case seems to have been carefully heard in a trial lasting through several days. The subscribing witness, Williams, is dead. The other subscribing witness, Wetmore, does not testify. He seems to have been a partner of Van Etten's. The jury appear to have believed the story of the plaintiff and her husband that their signatures were fraudulently obtained as sureties only, and to have declined to believe the defendants, and their claim that the note was made to provide a payment for services of David Van Etten. The case turns practically on the testimony of the parties themselves, both as to the cause of action set out by

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the plaintiff and as to the counter-claim of the defendant, David Van Etten, and the jury must be held entitled to judge as to the credibility of the several parties.

Objection is urged to certain instructions, but no specific error is pointed out, and we do not perceive any. The strongest point made on behalf of defendants is that the basis of this \$2,000 claim and the one on which they seek to recover is the conspiracy between the defendants to defraud; that the action against David Van Etten was dismissed and the recovery had against Mrs. Van Etten alone, whose part in the fraud, if there was one, seems to have been passive, notwithstanding that the plaintiffs swear that Mrs. Van Etten guided their hands in making the cross. There is nothing to indicate any participation with her husband in the making of the alleged false representations, which are the gist of the action. There is nothing in the record going to show that Mrs. Van Etten knew of any misrepresentations when the note was made or that she had any part in it. That being so she cannot be held liable for damages beyond the amount paid on the note by plaintiffs. The instructions permitted the jury to find for the plaintiffs for the amount of the judgment which was paid out of their property, if they found that plaintiff and her husband made the note simply as sureties, but knew of its amount and character. They permitted the jury to find to the full amount of the value of plaintiffs' lost property, if they found that the note was obtained by misrepresentation and fraud. This seems clearly erroneous as against Mrs. Van Etten. They instructed the jury to find for the defendants, if they found that this was simply a method taken by the plaintiffs to pay money which was due David Van Etten. And they fairly submitted the question as to the account for services which constituted the counter-claim.

The showing in the motion for a new trial as to the misconduct and incompetency on the part of one member of the jury cannot be considered here. The affidavits were not made part of the bill of exceptions, and cannot be

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considered. Merely as attached to the motion for a new trial, they are not a part of the record.

For lack of evidence that Mrs. Van Etten knew of or participated in any fraudulent misrepresentations to procure the note in question, it is recommended that the judgment of the district court be reversed and the cause remanded.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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NATHAN CAMPBELL ET AL V. D. LAUE.

FILED NOVEMBER 20, 1901. No. 10,539.

Commissioner's opinion. Department No. 2.

1. **Statutes: JOINT JUDGMENT: ASSIGNMENT OF ERROR.** A judgment entered in accordance with section 511 of the Code is none the less a joint judgment. Hence an assignment of error that the "court erred in rendering a joint judgment against the defendants" does not raise the question whether the requirements of said section should have been complied with.
2. **Replevin Bond: LIABILITY UNDER.** The condition of a replevin undertaking being that the plaintiff would pay all "damages and costs" which should be "awarded against him," the surety may be held for costs recovered by the defendant in replevin although the latter may not have paid them.
3. **Effect of Appeal Bond on Replevin Undertaking.** A replevin undertaking is not discharged by the giving of a subsequent appeal bond in the same action; nor can the surety in the replevin undertaking insist that the appeal bond be first sued upon.

ERROR from the district court for Buffalo county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Marston & Marston*, for plaintiffs in error.

*B. O. Hostetler*, contra.

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POUND, C.

Three questions have been argued in this cause. The first is that a judgment of the kind provided for in section 511, Code of Civil Procedure, should have been entered. But we do not think this question is raised by the petition in error which merely complains that the court "erred in rendering a joint judgment against the defendants." The judgment provided for in section 511 is a joint judgment. *Farney v. Hamilton*, 54 Neb., 799. No assignment of error is made on the ground that the judgment as entered does not certify which of the defendants is surety.

Another point urged is that the plaintiff, who was the successful defendant in an action of replevin and sued on the undertaking, was allowed to recover certain costs for which he had obtained judgment in the replevin case but which he had not paid. The condition of the undertaking was that the replevin plaintiff should pay "all damages and costs" which should be "awarded against him." These costs were a part of the judgment recovered. They were "awarded against" the principal, and are within the very letter of the bond. The plaintiff herein is liable for them to the clerk and is clearly entitled to recover them of the surety in the undertaking.

Finally it is said that an appeal bond subsequently given by the plaintiff in replevin should be first sued upon. It may be true that the surety in the replevin undertaking was secondarily liable as between himself and the surety on the appeal bond. But this would not cast any duty on the plaintiff in this cause of pursuing one rather than the other. The surety cannot urge his rights with respect to the other bond against this suit. *State v. McGlothlin*, 61 Ia., 312, 16 N. W. Rep., 137; *Church v. Simmons*, 83 N. Y., 261; *Shannon v. Dodge*, 18 Colo., 164, 32 Pac. Rep., 61; *Coonradt v. Campbell*, 29 Kan., 391.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

Pettibone v. Yeiser.

**J. H. PETTIBONE ET AL., APPELLANTS, V. JOHN O. YEISER ET AL., APPELLEES.**

**FILED NOVEMBER 20, 1901. No. 10,545.**

**Commissioner's opinion. Department No. 3.**

- 1. Appeal and Error: RULINGS PRESENTED ON APPEAL.** Rulings of the trial court, made during the progress of the trial, will not be reviewed by this court when presented on appeal.
- 2. Appeal and Error: EVIDENCE ON APPEAL.** A party who brings a case to this court on appeal, impliedly consents to submit the issues for decision on the evidence actually in the record.
- 3. Appeal and Error: FORECLOSURE OF TAX LIEN: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to warrant the finding and decree of the trial court.

**APPEAL** from the district court for Webster county.  
**Tried below before BEALL, J. Affirmed.**

*R. T. Potter and J. S. Gilham, for appellants.*

*Jno. O. Yeiser, pro se.*

**ALBERT, O.**

This action was brought to foreclose an alleged tax lien on real estate. The trial court found for the defendants and dismissed the action. The plaintiffs come here on appeal.

Complaint is made of some of the rulings of the court, made during the progress of the trial, but it is the settled rule of this court that such rulings will not be reviewed on appeal, but must be presented by petition in error. *Alling v. Nelson*, 55 Neb., 161. In the same case it is held that a party who brings a case here on appeal impliedly consents to submit the issues for decision on the evidence actually in the record. Hence, the only question that presents itself is, whether the evidence, actually in the record, warrants the finding and decree of the trial court. One of the facts essential to a finding and decree in favor of the plaintiffs is the regularity of all proceedings prior to the

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tax sale under which plaintiffs assert their lien. The tax certificate was ruled out, rightly or otherwise we cannot, as we have seen, determine in this proceeding. Had it been admitted, if admissible, it would have been presumptive evidence of such regularity. Whether such fact could have been shown by other evidence, we need not determine, because it is sufficient to say that it was not. Therefore, there is a failure of proof on a material point, and the court properly found for the defendants and dismissed the case.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

AFFIRMED.

NOTE.—See bill passed by the 1903 legislature set out in 1 Neb. [Unof.], 763.—REPORTER.

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JAMES WHITWELL V. HARMON JOHNSON.

FILED NOVEMBER 20, 1901. No. 10,548.

Commissioner's opinion. Department No. 1.

1. **Secondary Evidence: CONTENTS OF LETTER: FOUNDATION FOR INTRODUCTION.** Before the contents of a lost letter can be introduced in evidence there must be testimony of its loss and also testimony tending to prove the handwriting, or that it came from the alleged writer or his authorized agent, or was received in due course of mail in answer to letters previously mailed to the address of the alleged writer.
2. **Appeal and Error: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* not to be sufficient identification to permit the contents of the letter to be received in evidence.

ERROR from the district court for Butler county. Tried below before BATES, J. *Reversed.*

*W. A. Saunders*, for plaintiff in error.

*Matt Miller*, *contra.*



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DAY, C.

This case was tried in the district court for Butler county upon appeal from a judgment of the county court. The trial resulted in a judgment in favor of the defendant, to review which the plaintiff has brought error to this court.

The basis of the action is a promissory note for \$450, executed and delivered by the defendant, Harmon Johnson, to one John Hawthorne and by him assigned to the plaintiff for a valuable consideration before maturity. The record discloses that the note was a part of the purchase price of two valuable horses, one of which was a registered Clydesdale stallion, purchased by the defendant for breeding purposes, and guaranteed by the seller Hawthorne as a reliable foal getter. One of the conditions of the sale was that if the guarantee should fail the note was to be returned to the defendant. The testimony was clear and undisputed that the horse failed to meet the requirements of the guarantee.

The real question presented upon the trial was whether the plaintiff was an innocent purchaser of the note. The theory upon which the case was tried on behalf of the defendant was that plaintiff was in fact a part owner of the horses at the time of the sale, and as such could not become an innocent purchaser of the note. In support of his contention the defendant, over the objection of the plaintiff, introduced the contents of a lost letter claimed to have been written by the plaintiff to the defendant prior to the purchase of the note by plaintiff, in which plaintiff made inquiries respecting the terms of the sale to the defendant by Hawthorne and others and in which he stated he had an interest in the horses. The plaintiff denied having written any letter to the defendant. The evidence tending to establish the existence of the letter preliminary to the introduction of secondary evidence of its contents was as follows:

"After you purchased the horse and mare from Hawthorne, you may state whether or not you ever received any

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letters from James Whitwell, the plaintiff in this action? A. I did. How did you receive it? A. Well, I received it in an envelope. Through the post office? A. Yes, sir, through the post office."

Evidence was also introduced tending to establish the loss of the letter and that unsuccessful search had been made for it in the places where it was most likely to be found. No attempt was made to show that the letter was in the handwriting of the plaintiff, or that it was sent by his authority or direction or that it was in response to a letter previously written to him. The only identification of the letter was the declaration of the defendant that he received it from the plaintiff, and on cross-examination it was shown that his statements were his conclusions drawn from the fact that the name James Whitwell was signed to the letter. If the letter itself had been offered in evidence it would have been incompetent until it had been in some manner identified as the plaintiff's letter, and the same rule obtains where an instrument has been lost and its contents are sought to be shown. In our opinion the identity of the letter was not sufficiently established to permit of the introduction of secondary evidence of its contents. The mere fact that it was signed, James Whitwell, would not of itself create the presumption that the plaintiff wrote it. In *Gartrell v. Stafford*, 12 Neb., at page 546, the rule is stated as follows: "Where a contract is sought to be proved by letters, there must be testimony tending to prove the handwriting, or that they came from the defendant or an authorized agent, or were received in due course of mail in answer to letters mailed to the address of the alleged writer." The introduction of testimony of the contents of the letter was incompetent and highly prejudicial to the plaintiff.

It is therefore recommended that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

Brown v. Helsley.

FRANK D. BROWN, ADMINISTRATOR OF THE ESTATE OF  
LUCIEN WOODWORTH, DECEASED, v. LEE HELSLEY.

FILED NOVEMBER 20, 1901. No. 10,550.

Commissioner's opinion. Department No. 2.

1. **Pleading: CONSTRUCTION AFTER JUDGMENT.** When a petition is not assailed until after judgment, it will be liberally construed so as to be sustained, if possible.
2. **Absolute Judgment: DEFINITION.** An absolute judgment is one which is operative and effective.
3. **Duty of Officers: PRESUMPTION.** It is the presumption of law that all officials have done their duty until the contrary is shown.

ERROR from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*T. J. Mahoney*, for plaintiff in error.

*Charles S. Lobingier*, contra.

*Lee Helsley*, pro se.

OLDHAM, C.

This was a suit against a surety in an undertaking in appeal. The material allegations of the petition were: that one Antonio Columbio procured a judgment before a justice of the peace of Douglas county, Nebraska, for \$194 against Frank Romano and Michelina Romano on the 5th day of July, 1895; that on the 15th day of July the defendant, Lucien Woodworth, made, executed and delivered to the plaintiff in said suit an undertaking in appeal in the sum of \$500. The undertaking is set out in the petition and is in the statutory form, and contains, among other things the following condition: "That the said Frank Romano and Michelina A. Romano will prosecute their appeal to effect without unnecessary delay and that said appellants, if judgment be rendered against them on appeal will satisfy such judgment and costs." The

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petition further alleges that said cause was appealed to the district court for Douglas county, Nebraska, and on the — day of May, 1896, a judgment with costs was duly rendered against the said Frank Romano and Michelina A. Romano. It is further alleged that said judgment has not been reversed or modified and that no proceedings are pending to reverse said judgment and the same has become and now is absolute. It is also alleged that an execution was issued on the judgment and returned unsatisfied either in whole or in part. The 5th and 6th paragraphs of said petition are as follows:

“5. Plaintiff further alleges that in the several trials of the said cause of Columbio v. Romano, the following named persons earned fees as follows: John Drexel, as sheriff, \$7.70; John MacDonald, as sheriff, \$1.10; M. Maring, as witness, \$10.00; Frank Pascall, as witness, \$20.20; B. Mancuzo, as witness, \$5.30; Martin Dunnizzo, \$11.90, as witness; Lewis Defrazzia, \$20.20, as witness; M. Romano, as witness, \$4.00; Antonio LaGrotta, as witness, \$20.00; G. Dennuzzo, \$14.00, as witness; Frank Moores, as clerk, \$13.65; A. Frank, as clerk, \$27.00; county of Douglas for jury fees, two trials, \$10.00; C. W. King, as constable, \$4.75; John A. Karling, as justice of the peace, \$8.10; G. H. Fitch, as constable, \$8.80; A. Columbio, for money advanced, \$6.00; the total of said several amounts being the sum of \$186.70. 6. Plaintiff further avers that the several sums named above have been duly assigned to him and that he is now the owner of the same.”

When this petition was filed defendant, Woodworth, entered a voluntary appearance in the court below but neglected to either plead or answer until after judgment had been rendered against him. He then filed a motion for a new trial and brought error proceedings to this court. After suit was instituted in this court defendant, Woodworth, departed this life, intestate, and the cause was revived in the name of his administrator.

The only question called to our attention is as to the sufficiency of the petition to sustain the judgment. As

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this question was not presented until after judgment in the court below it must be determined under the rule that when a petition is not assailed until after judgment it will be liberally construed, and every reasonable presumption will be indulged to sustain it if possible. We cannot now examine the question as to whether this petition would have been vulnerable to a motion to make it more specific and certain, because the time for filing such a motion has long since passed; nor can we examine it in the light of defenses that might have been interposed by answer, because answer day was permitted to pass by the neglect of the defendant in the court below. The only question is, will this petition, when aided by all reasonable presumptions as to its sufficiency, support a verdict?

It is alleged against the petition that the costs for which suit is brought are not alleged to have been taxed against the Romanos in the judgment against them in the district court. While the petition does not contain this specific allegation it does allege that "a judgment with costs was duly rendered against the said Frank Romano and Michelina A. Romano." It also alleges that at the several trials of the cause the persons named in the petition "earned fees, as follows" (enumerating them). Now as all the fees sued for were proper items to have been taxed as costs it will be presumed, in absence of a showing to the contrary, that the officer whose duty it was to tax costs, did his duty. Again, the condition of the bond was that he, defendant, "will satisfy such judgment and costs" so that the condition of the bond did not limit the liability of the defendant to only such costs as should be taxed against the Romanos in the district court. If any of the costs sued for were improperly charged such fact should have been plead before judgment. It is further urged against the petition that it does not show that the costs sued for have not been paid. In the first place if the defendant relied on payment as a defense to this action he should have plead it; and again, we think, that under a liberal rule of con-

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struction the petition does show that the costs sued for had not been paid, because the petition alleges "that a judgment, with costs" was duly rendered against the Romanos and that the same "has become and now is absolute"; and it also alleges the issuing and return of an execution unsatisfied on such judgment. Now when a judgment is absolute it must be operative and effective and this allegation in the petition fairly negatives the fact of the payment of such judgment; also the allegation of the return of the execution on this judgment unsatisfied "in whole or in part" negatives the idea of any payment having been made on the judgment or costs. We therefore conclude that the petition, while not a model of concise pleading, is yet sufficient to sustain the judgment.

It is therefore recommended that the judgment of the district court be affirmed.

POUND and SEDGWICK, CC., concur.

AFFIRMED.

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UNION STOCK YARDS NATIONAL BANK V. DAVID L. CAMPBELL.

FILED NOVEMBER 20, 1901. No. 10,555.

Commissioner's opinion. Department No. 3.

**Restoration of Depository Fund.** A depository of a trust fund who parts with no consideration and is not misled to his prejudice by reason of the deposit, is bound to restore the fund to the true owner on demand, although such deposit was made by an agent or trustee and, until such demand, the depository had no notice of its real character.

ERROR from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*Kennedy & Learned*, for plaintiff in error.

*Baldrige & DeBord* and *H. H. Baldrige*, contra.

## Union Stock Yards Nat. Bank v. Campbell.

## AMES, C.

The facts in this case important in the present inquiry are briefly as follows: The Campbell Commission Company being engaged in the livestock commission business and having places of business at Omaha and Kansas City, Mo., W. H. Boyer & Company, livestock dealers at Omaha, shipped to the commission company at Kansas City a car load of cattle for sale in the ordinary course of business. The Kansas City branch received and sold the cattle and received for them, net above expenses and commissions, \$937.40. With this money they purchased from a Kansas City bank a cashier's check for that amount, payable to the order of Boyer & Company, and sent the same by mail to the Omaha branch, where it arrived the morning of July 12. At that time the commission company was doing a deposit and check account business with the plaintiff in error the Union Stock Yards National Bank, where its account was, and for several days had been over-drawn by more than the amount of the check. Independently of the check, Boyer & Company were indebted to the commission company in the sum of \$367.47. At the suggestion of the defendant in error, Campbell, who was a business agent of the latter company, Boyer & Company indorsed and delivered the cashier's check to it and received in lieu thereof its check for \$569.93, being the difference between the cashier's check and the amount of Boyer & Co.'s indebtedness. On the morning of the same day the commission company failed and went into the hands of a receiver appointed at Kansas City. At about one o'clock the cashier of the Omaha bank informed Campbell of this last mentioned fact, and demanded of him the deposit of all funds of the commission company in his hands, to the credit of its account with the bank. In compliance with this demand Campbell deposited the cashier's check which was afterwards collected, but which was insufficient in amount to make up the over-draft, and the bank did not after-

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wards make any payment to, or on account of the commission company. Later in the afternoon, the Boyer company check on the Omaha bank was presented for payment, and payment refused "for want of funds." Afterwards the rights and claims of Boyer & Company arising out of the transaction were assigned, together with the check, to the defendant in error who brought the action thereon. On the trial Campbell testified over objection and exception, that at and before the above mentioned exchange of checks, it was agreed between him and Boyer & Company, that the indebtedness of the latter to the commission company, should be paid out of the cashier's check. The inference sought to be drawn from this testimony is, that though Boyer & Company, by means of the transaction, parted with the naked legal title to the check, and enabled Campbell to make such use of it as he did make, yet it was not the intent of the parties that the funds should by that means be divested of their trust character, or to impair the right of Boyer & Company to pursue them as in other cases. The trial court drew this inference, and there being no conflict in the evidence, instructed a verdict for the plaintiff, and the bank brought the case here by proceedings in error.

After some hesitation, we have adopted the view of the district judge. The commission company were authorized to sell the cattle and receive the pay for them. If after having so done they had deposited the funds thus derived in the Omaha bank, there can be no doubt that under authority of *Cady v. South Omaha National Bank*, 46 Neb., 756, re-affirmed in 49 Neb., 125, Boyer & Company could have pursued them into and recovered them from the depository. It is equally clear, we think, that if the cashier's check had been made payable to the order of the commission company and had been by it deposited in the Omaha bank, the same result would have followed, because the fact that the funds were changed into a check would not have obscured the nature of the transaction, or have prevented their being traced to their final destina-



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tion. Neither does such obscurity arise from the fact that the check was made payable to the order of Boyer & Company and by them indorsed and left with the commission company for such deposit, after the former company had appropriated a part of the proceeds to the payment of its indebtedness to the latter. The residue of the funds was still the property of Boyer & Company, and the exchange of checks was merely a convenient means of enabling them to settle their indebtedness, and to withdraw from the commission company through the bank, the balance belonging to them. The above quoted testimony of Campbell was not inadmissible because, among other reasons, the same inference would have been drawn from the nature of the transaction in the absence of the agreement. Under circumstances like those of this case, the question of notice to the bank is immaterial. If the bank had parted with value or extended credit upon the faith of receiving the check, made payable to the order of Boyer & Company and indorsed by them, a new element would have been introduced from which there might have been important consequences, but no fact of that nature is pleaded or proved. The bank is in no worse condition than it would have been if the check had never been indorsed or delivered to it. On the other hand, it is better off by the amount of Boyer & Company's previous indebtedness to the commission company, which it was enabled to retain out of it. Under such circumstances it is not entitled to retain a trust fund for which it has parted with no consideration, and to which it has, therefore, acquired no right. *Cady v. South Omaha National Bank, supra*; *Burnett v. The First National Bank of Corunna*, 38 Mich., 630; *Davis v. The Bank*, 29 S. W. Rep. [Tex.], 926. Such seems to be the weight of authority both in this country and in England, and we are convinced that it rests upon sound and salutary principles.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

**AFFIRMED.**

Porter v. Trompen.

ALEXANDER S. PORTER, APPELLEE, V. JOHN J. TROMPEN,  
SHERIFF OF LANCASTER COUNTY, ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,558.

Commissioner's opinion. Department No. 1.

1. **Execution: COMPLICATED TITLE: REFUSAL OF SHERIFF TO SELL: DAMAGES.** No damage appearing to have been sustained and the trial court finding that the complicated condition of the title justified the sheriff in refusing to sell real estate levied upon by execution, decree, directing sale but exonerating sheriff, upheld.
2. **Awarding Costs: DISCRETION OF TRIAL COURT.** In other actions than those in which costs follow of course, the discretion of the trial court in awarding costs will not be interfered with, except where facts regularly brought before this court show abuse of such discretion.

APPEAL from the district court for Lancaster county.  
Tried below before CORNISH, J. *Affirmed.*

*Billingsley & Greene*, for appellant, Trompen.

*Walter J. Lamb*, contra.

HASTINGS, C.

This is an appeal originally taken by a number of defendants from a decree rendered in favor of plaintiff directing the sale in a certain order of real estate which had been previously levied upon by the defendant, sheriff. May 29, 1896, the plaintiff procured an execution from the district court for Lancaster county against Jonathan Chase, Joseph M. Beardsley and Benjamin A. Gibson for the sum of \$1,190.30 and costs, an unpaid remainder on a judgment of \$15,100, recovered July 18, 1890, by the consideration of the district court of Douglas county. This execution the sheriff proceeded to levy upon a long list of lands as the property of Benjamin A. Gibson; and then returned the execution for lack of time to sell. Plaintiff then procured a *vendi* on which the lands were advertised for sale, and subsequently the *vendi* was re-

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turned for the following reason given: "Having been notified by the clerk of the district court of a mandate issued by the supreme court restraining the sale under the judgment on which this writ issued of the property of Benj. A. Gibson I herewith return this writ without offering said land for sale." The mandate is found to have contained the following: "That the judgment rendered by you in said cause be modified so that the appellants shall be restrained from further enforcing the execution or levy thereof against the property of Benjamin A. Gibson for the purpose of applying the proceeds thereof in satisfaction of the balance due on the judgment in favor of Alexander S. Porter and against Benjamin A. Gibson, Jonathan Chase and Joseph M. Beardsley, and as thus modified the said decree be affirmed at the costs of the appellee."

The court finds that the plaintiff was entitled to have the amount due on the *vendi* made out of the property levied upon, and that the sheriff should proceed to sell the same in accordance with the statute, and provides the order in which the premises should be sold. The court also made the following finding: "And the court further finds that by reason of the premises and the foregoing facts as found and the involved condition of the title to the said several tracts of land and the claims of the defendants and cross-petitioners respectively made against said sale that the plaintiff is not entitled to a personal judgment against the defendant, John J. Trompen, for his refusal to sell the said property under the said *vendi* in his hands which he was requested by the plaintiff to do." Plaintiff now claims the court should have given him judgment against the sheriff for the amount of the execution and the costs of this action.

A bill of exceptions was settled by the appealing defendants and the plaintiff, but the sheriff does not appear to have been made a party to the bill of exceptions, and as against him it cannot be considered. Indeed it is difficult to find upon what basis it can be held that there

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is any appeal here on the part of plaintiff. A careful examination of the record fails to reveal any sign of any cross-appeal on plaintiff's part, except his brief. He seems, however, to have taken exception to the finding in favor of defendant, sheriff, and as the transcript is here perhaps plaintiff is entitled to have the case considered as appealed on his behalf and against the sheriff. He is not, however, entitled to have the bill of exceptions considered, and the only matter that need be examined is whether the findings of fact made by the court when applied to the pleadings disclose any relief to which the plaintiff is entitled and show a right of recovery on his part.

The findings so far as they relate to the dispute between the plaintiff and the sheriff are as above stated. They establish a lien, and a right to sell property on the part of plaintiff. It is manifestly impossible that there can have been any disappearance or loss of property. There is nothing in the findings anywhere to indicate any loss of value or that the property had not enhanced in value during the time that the plaintiff was required to wait. Neither is there anything to indicate that the property is not ample to discharge the execution and interest. Plaintiff's own petition is in the alternative for either a judgment or a decree such as was rendered. Probably the fact that the prayer for relief is in the alternative and one has been granted would not warrant the refusal at this time to grant the other also, if the facts set out in the pleadings and found by the court would warrant it. Bliss, Code Pleading [3d ed.], section 161. But they certainly do not. The facts found by the court do not disclose as above suggested any actual loss or damage sustained by the plaintiff because of his delay in procuring the sale of the property.

Plaintiff strenuously insists that he is entitled to costs at all events as against the sheriff. Costs in an action of this kind seem to be placed by the statute in the discretionary control of the court. This does not seem to

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be one of the actions mentioned in section 620 of the Code of Civil Procedure, in which costs are allowed of course upon a recovery by plaintiff. It is rather one of those "other actions" mentioned in section 623 of the Code, in which the court may award and tax costs as "in its discretion it may think right and equitable." The facts in this case and upon which the trial court acted are not before us, and we are without any means of determining that the action of the trial court was not just and equitable, and, of course, in the absence of any contrary showing, its correctness must be presumed.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

**AFFIRMED.**

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**JOHN SCHMUCK V. CORA BEIL HILL.**

FILED NOVEMBER 20, 1901. No. 10,565.

Commissioner's opinion. Department No. 2.

1. **Libel: SUFFICIENCY OF PUBLICATION.** While the sending of a libelous letter to the person defamed does not amount to publication thereof, where the sender so addresses it that in ordinary course it will reach a third person, and as a natural result it does reach and its contents become known to such third person, there is a sufficient publication.
2. **Libel: SUFFICIENCY OF PUBLICATION.** Hence where a libelous letter concerning plaintiff was sent by mail addressed to plaintiff's employer and plaintiff jointly, and delivered at her employer's shop, where it was found by plaintiff and turned over unopened to her employer, who read it, *held* that there was a publication.
3. **Libel: LIABILITY FOR PUBLICATIONS SUBSEQUENT TO FIRST.** One who puts a libel in circulation is liable for any subsequent publications which are the natural consequence of his act.
4. **Witnesses: OBJECTION TO QUESTIONS: BY WHAT JUDGED.** An objection to a question propounded to a witness is to be judged by the question itself and its relation to the then state of the case.
5. **Evidence of Handwriting: SAMPLES OBTAINED BY DURESS OR FRAUD: PROOF.** If writings offered as evidence of handwriting are admitted by a party to be his, but he claims that their form is the

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result of duress or fraud, the proper course is to show such fact for the purpose of affecting their weight.

6. **Expert Witnesses: COMPETENCY: DISCRETION OF COURT.** The competency of expert witnesses is a question largely within the discretion of the trial court, and its rulings thereon will not be reversed unless clearly erroneous as a matter of law.
7. **Appeal and Error: INSTRUCTION AS TO LEGAL CONSEQUENCES OF CERTAIN FACTS: CORRECTNESS.** An instruction which merely points out the legal consequence of certain facts, of which there is evidence, in case the jury find them to be established, is not erroneous.
8. **Several Causes of Action: VERDICT UPON EACH: VALIDITY.** Where several causes of action are set up in the petition a separate verdict upon each is not improper.
9. **Preponderance of Evidence: RULE NOT CHANGED UNDER CERTAIN FACTS.** The rule that a plaintiff in a civil action is only required to prove his case by a preponderance of the evidence is not altered by the fact that the acts charged upon the defendant are highly discreditable or even criminal.
10. **Appeal and Error: EVIDENCE.** Evidence examined, and *held* to sustain the verdict.

ERROR from the district court for Gage county. Tried below before STULL, J. *Affirmed.*

*E. O. Kretsinger*, for plaintiff in error.

*Hazlett & Jack*, contra.

POUND, C.

Cora Bell Hill, hereinafter styled plaintiff, sued John Schmuck, hereinafter referred to as defendant, upon four causes of action, two for libel by reason of a letter alleged to have been sent and published to her sister and employer, Grace Hill, and a similar libelous communication posted upon a telephone pole in front of the post-office in the city of Beatrice, and two for slander. The trial resulted in a verdict and judgment for plaintiff, from which error is now prosecuted.

The letter which is the basis of the first cause of action was sent by mail addressed to "Ms. Grass Hill, Cora Hill" at the business address of plaintiff's employer. The post-

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man delivered the letter by placing it under the door, where it was found by plaintiff and by her delivered unopened to her sister who opened it and became acquainted with its contents. Under these circumstances, it is urged on behalf of the defendant that there was no publication by him but that the letter having been first found by plaintiff and by her turned over to her sister, plaintiff and not defendant gave it publicity. It is undoubtedly true that sending a libelous letter to the person defamed does not amount to publication thereof. On the other hand, where the sender so addresses it that in ordinary course it will reach a third person, and, as a natural result of the way in which it is sent or addressed it does reach and its contents become known to such third person, there is a sufficient publication. Thus, in *Delacroix v. Thevenot*, 2 Stark. [Eng.], 63, a libelous letter addressed to the plaintiff was received, opened, and read by his clerk in the regular course of his employment. It was shown that the defendant knew that the clerk habitually opened letters addressed to plaintiff unless marked "private." This was considered evidence of intention that the letter should be read by a third person and the defendant was held liable. In *Seip v. Deshler*, 170 Pa. St., 334, a libelous letter addressed to plaintiff was opened and read by her agent who had charge of her business correspondence, and had reason to suppose the letter related to her business. It was held that there was a publication. In the case at bar, the letter was addressed to a third person as well as to the plaintiff, at the third person's place of business, and it appears that defendant knew that such third person was the plaintiff's employer. Moreover the name of the employer stood first in the address. It would seem clear that he intended the employer to see and read the libelous communication, and that plaintiff's handing the letter unopened to her was an ordinary and natural result of the manner in which it was addressed and the known relation of the addressees to each other. But it may be observed further that in any case plaintiff's sister

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as one of the joint addressees had a right to see and read a letter which had come to her shop through the mails and hence handing it to her was not a voluntary publication by plaintiff but a necessary result of the manner in which defendant sent and addressed it. The same state of facts was presented in *Fonville v. M'Nease*, Dudley, Law [S. Car.], 303, and it was held that if the other addressee read the letter or required the plaintiff to turn it over there would be a publication.

An assignment of error which has been pressed strongly relates to the ruling of the trial court upon certain questions asked of the plaintiff for the purpose of showing that the letter and its contents became known to the public and to the citizens of Beatrice. Of course, if the libel was republished and given currency by plaintiff herself, defendant would not be liable for the resulting damage. On the other hand, one who publishes a libel is liable for any subsequent publications which are the natural result of his act. It was alleged in the petition that the libel had been seen and read by the public and had gained publicity, and so far as the court could judge from the pleadings and the questions themselves, the evidence called for was proper. An objection to a question propounded to a witness must be judged by the question itself and its relation to the then state of the case. If the answer was unresponsive and improper, it might have been stricken out. If the subsequent course of the testimony showed that the plaintiff and not the defendant was responsible for the republications, a request for an instruction that defendant was not liable therefor would have been proper. But the court had to rule on the questions themselves, and they were not objectionable on their face. *Missouri P. R. Co. v. Fox*, 60 Neb., 531, 552. A similar question is presented by the rulings of the court upon certain envelopes written upon by defendant and received as evidence of his handwriting. He admitted that the writing on these envelopes was his; but it is claimed that in ignorance of his rights he was induced or



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compelled to write upon them by the United States district attorney during criminal proceedings growing out of the transaction, and that he was deceived into copying or endeavoring to copy and imitate the address on the envelope containing the libel in question. As he himself testified before the writings were offered that they were his, the court properly admitted them. If they were obtained by duress or fraud, the proper course was to show such fact for the purpose of affecting their weight as evidence. This was done, and in view of defendant's testimony as to where and how they were written it was for the jury to settle their evidential value.

Objection is also made to the testimony of certain witnesses as experts in handwriting. One of these had seen the defendant write and knew his writing independent of his expert qualifications. The qualifications of the other witness complained of were not extensive. But the competency of expert witnesses is a question largely within the discretion of the trial court, and its rulings thereon will not be reversed unless clearly erroneous as a matter of law. *Missouri P. R. Co. v. Fox*, 60 Neb., 531. There was sufficient foundation laid so that we cannot say the testimony was absolutely incompetent.

Several instructions given by the court are excepted to as assuming facts in issue. We do not think any of them fairly open to this objection. Each of them is clearly conditioned upon the jury finding the facts on which the rules announced are stated to depend. There was evidence of these several facts, and the instructions merely pointed out their legal consequences in case the jury found them to be established. The other instruction criticised was not complained of in the motion for a new trial and is not reviewable. By direction of the court, the jury made a separate finding and assessment of damages upon each cause of action. We think this was not only not improper, but eminently favorable to defendant, and no reason has been suggested for believing that it could have prejudiced him or his cause in any way. 2 Thompson, Trials, section 2640.

Woodard v. Cutter.

Finally it is urged that the verdict on the first two causes of action is contrary to the evidence, and in this connection we are asked, in view of the highly discreditable nature of the acts charged upon the defendant and the fact that they involve two criminal offenses, to hold that they must be fastened upon him conclusively by the evidence. It is fundamental that a plaintiff in a civil action is only required to prove his case by a preponderance of the evidence. Where a party seeks to impeach or to vary the usual meaning of his own formal acts, or to impeach the solemn certificate of an officer, it may be that more is required to make out a preponderance of the evidence than in other cases. But the ordinary rule is not altered because the acts alleged against the defendant are discreditable or even criminal. We have gone over the evidence on each cause of action and find it ample to sustain the verdict. Indeed, we have been impressed that defendant had an unusually fair and dispassionate trial in view of the gross indecency of the libel and the wanton and malicious manner in which it was posted in one of the most conspicuous spots in the city of Beatrice. In justice to the plaintiff, however, we do not think we ought to give it further currency by discussing the evidence in detail.

It is recommended that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

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NELLIE WOODARD V. BLOODGOOD H. CUTTER.

FILED NOVEMBER 20, 1901. No. 10,568.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error:** ERROR NOT IN MOTION FOR NEW TRIAL NOR PETITION IN ERROR. This court will not, in an error proceeding, reverse a case where the error alleged was neither presented to the court below in the motion for a new trial nor assigned as error in the petition filed in this court.

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2. **Depositions: OBJECTIONS—WHEN TO BE MADE.** Objections to depositions other than for incompetency or irrelevancy must be presented to the court before the commencement of the trial.

ERROR from the district court for Dawes county. Tried below before WESTOVER, J. *Affirmed.*

*Allen G. Fisher*, for plaintiff in error.

*Albert W. Crites*, contra.

DUFFIE, C.

This action was brought to foreclose a mortgage on lot six (6), block eighteen (18), in the city of Chadron, Nebraska. The petition is in the usual form, and a decree is prayed for the foreclosure of the mortgage and against the defendants who were personally liable upon the note for any deficiency.

Upon the trial it was stipulated that the question of liability for a deficiency should be postponed as against all parties except the plaintiff in error. No written motion for a new trial was filed by the plaintiff in error, but the bill of exceptions contains a motion for a new trial which was evidently dictated to the reporter and counsel for plaintiff in error makes the claim in his brief that this was done under an agreement of the parties and by leave of court. Without now determining whether the provision of our Code of Civil Procedure requiring pleadings to be in writing, may be waived by the parties, we will proceed to determine the case as though a motion for a new trial had been regularly filed. The motion contained five assignments of error as follows: First. Errors in law occurring at the trial duly excepted to. Second. Error in the amount of the assessment of the decree. Third. The court erred in the admission of evidence for the defendant's timely objection. Fourth. The petition of the plaintiff fails to state a cause of action against the defendants. Fifth. The petition of the plaintiff with defendant's reply failed to show the plaintiff entitled to any relief against the defendants.

Peterson v. Estate of Peterson.

It is now insisted that the decree is not supported by the evidence, in that there was no evidence offered to support the allegation of the petition "that no action at law has ever been brought in any court for the recovery of said promissory note and mortgage deed." Neither the petition in error filed in this court, nor the motion for a new trial, assign as error the insufficiency of the evidence to support the decree, and we can consider no error of the district court not assigned as such in the petition in error.

It is further urged that the district court erred in admitting in evidence the deposition of Bloodgood H. Cutter. There is no doubt that the deposition should have been suppressed if timely objections had been made thereto by written objections filed in the district court. The record before us fails to show that any written objections were made to the deposition and our statute is plain that "no exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial." Code of Civil Procedure, section 390.

We discover no reversible error in the record and therefore recommend that the decree of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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T. L. PETERSON V. ESTATE OF MARGARET PETERSON, INSANE,  
ET AL.

FILED NOVEMBER 20, 1901. No. 10,570.

Commissioner's opinion. Department No. 3.

Appeal and Error: CONFLICTING EVIDENCE. The judgment of a district court will not be disturbed where the evidence was conflicting, if the record discloses sufficient competent evidence to support such judgment.

ERROR from the district court for Dixon county. Tried below before EVANS, J. *Affirmed.*

Peterson v. Estate of Peterson.

*McNish & Oleson and A. E. Barnes*, for plaintiff in error.

*J. J. McCarthy*, contra.

DUFFIE, C.

This action was instituted to recover the sum of \$2,793.50 from the estate of Margaret Peterson, an insane person, and J. A. Seagren as guardian. The petition alleges that one John E. Larson who was formerly guardian of the person and estate of the said Margaret Peterson, by means of threats and false representations, obtained from the plaintiff the money which it is sought to recover by this action. It is alleged that the plaintiff is illiterate and unable to read or understand the English language and ignorant of his legal rights; that Larson, after his appointment, represented and said to him that unless the money was paid over, the plaintiff would be thrust into jail and imprisoned; that the money belonged to said Larson as guardian, and unless delivered and paid over to him, said money and all money belonging to the plaintiff would be taken from him; that the court had ordered him to take that amount of money from plaintiff, and that the order of the court must be complied with in order to save trouble to the plaintiff; that the money so taken was the absolute property of the plaintiff; that the representations made by the guardian were false and untrue in every particular, as he well knew; that the plaintiff did not receive any consideration whatever for the money so turned over to the guardian, nor did he give any part of said sum to the guardian as a gift or donation of the estate for which he was acting, but delivered the same in ignorance of his rights and in consequence of the fraudulent representations and the threats made by the said guardian.

The answer admits that the defendant, Seagren, is the duly appointed and acting guardian of Margaret Peterson, insane, and that said Margaret Peterson is the wife of

## Peterson v. Estate of Peterson.

the plaintiff, T. L. Peterson. Further it is alleged that at the time of the appointment of John E. Larson as guardian, the plaintiff and his wife, Margaret Peterson, owned a homestead in Dixon county, Nebraska, and no other property; and being desirous of selling said homestead, and in order to properly protect the rights of Margaret Peterson and to properly convey said homestead, a guardian was appointed for her. That after the appointment of said Larson as guardian, and after the sale and conveyance of the homestead, the plaintiff voluntarily paid to Larson, as guardian, the sum of \$1,830 in notes for Margaret Peterson's interest in the homestead. The case was tried to the court which filed its findings of fact and conclusions of law. The first, sixth and eighth findings of fact by the court are the only ones that need to be considered and are as follows:

"First. The court finds that Margaret Peterson was in due form of law adjudged to be insane and was placed under guardianship, and that at the time of such adjudication and the appointment of a guardian for the said Margaret Peterson, the claimant and plaintiff herein, T. L. Peterson, had in his possession and under his control, \$5,000 which was the proceeds of the sale of two hundred acres of land, one hundred and sixty acres of which had been occupied by the said Margaret Peterson and T. L. Peterson as their homestead, the said parties being husband and wife, and the title to which had been in said T. L. Peterson."

"Sixth. The court further finds that after the appointment of the said John E. Larson as guardian of the estate and person of the said Margaret Peterson, the said guardian requested the said T. L. Peterson to give him, the said guardian, one-third of his, Peterson's, estate for the use and benefit of his wife, Margaret Peterson, and that in compliance therewith, the said T. L. Peterson did turn over to the said guardian, the sum of \$1,830 composed of cash and notes. That there was an agreement between the said guardian and the plaintiff, T. L. Peterson, that

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the said Peterson should have the care and control of the person of the said Margaret Peterson, and that for such care he should receive all the interest and profit arising out of her estate."

"Eighth. And the court further finds that at the time the request for money was made, neither T. L. Peterson nor the said John E. Larson knew what the legal rights of the parties were in the premises and that there was no fraud on the part of the said John E. Larson."

As conclusions of law, the court found that the plaintiff was not entitled to recover and judgment was entered accordingly.

It is urged by the plaintiff in error that there was no evidence whatever to support the findings of the district court, that a part of the land sold was the homestead of Peterson and wife. Conceding this to be true, we cannot see that it makes any difference in the legal aspect of the case. That Peterson's wife was insane is undisputed; that Peterson was legally liable for her support cannot be controverted. While there was no legal way of compelling Peterson to set aside any part of his money for the support of his wife, or to place it in the hands of her guardian for that purpose, he had the right to do so if he chose. Whether he did so willingly or from fear induced by threats used by Larson was the controverted question in the case. Larson's testimony is plain and explicit that no threats were used, and to our minds the evidence in favor of the findings of the court preponderates, and it certainly is sufficient to support the findings. All of the witnesses who testified upon the trial were apparently but little acquainted with the English language and we confess that we have been troubled to ascertain the full meaning of all that was said. In this respect the record is in a very unsatisfactory condition; but this is only another reason why we should refuse to interfere with the findings of the court who heard and saw the witnesses and who had a better opportunity of arriving at their meaning than we can have from the record before us.

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We recommend that the judgment of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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CAROLINE DAVIDSON, EXECUTRIX, AND SPECIAL ADMINISTRATRIX OF THE ESTATE OF GUSTAF DAVIDSON, DECEASED, V. ANDREW DAVIDSON ET AL.

FILED NOVEMBER 20, 1901. No. 11,885.

Commissioner's opinion. Department No. 1.

1. **Wills: CONTEST: DECLARATIONS OF TESTATOR SUBSEQUENT TO MAKING WILL.** Mere declarations of a testator subsequently to the execution of a will are not evidence, in a contest of the will on the sole ground of undue influence, of any fact as to the existence of such influence stated in them.
2. **Wills: CONTEST: DECLARATIONS OF TESTATOR PRIOR TO MAKING WILL: WHEN NOT ADMISSIBLE.** In the absence of independent proof of undue influence where the sole issue is as to its existence, such declarations are not admissible for any purpose.
2. **Wills: CONTEST: RES GESTÆ.** A conversation fifteen or twenty minutes after the execution of a will, between the testator and a subscribing witness in the absence of the other subscribing witness who drew it and in a different building from the one where it was made, which conversation refers to the will as already made and contemplates its continued existence, is not admissible as part of the *res gestæ*.
4. **Wills: CONTEST: ADMISSIBILITY OF EVIDENCE UNDER RECITAL IN WILL.** A recital in a will offered for probate does not warrant the admission of evidence, which is otherwise inadmissible under section 329 of the Code, merely in order to contradict such recitals.
5. **Wills: INSTRUCTION PREJUDICIAL.** An instruction in effect to find for contestants, if the testator made the will only to keep peace in the family, *held* prejudicial error, the only issue being as to undue influence.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Reversed.*



## Davidson v. Davidson.

*A. J. Shafer and H. M. Sinclair*, for plaintiff in error.

It cannot be proved as direct evidence of coercion or undue influence that the testator after executing his will stated that in some particular respect it did not contain his intention. 1 Underhill, Wills, section 161; *Gwin v. Gwin*, 48 Pac. Rep. [Idaho], 295; *Todd v. Fenton*, 66 Ind., 25; *Harring v. Allen*, 25 Mich., 505; *In re Storer*, 28 Minn., 9; *In re Hess' Will*, 48 Minn., 504; *In re Merriman's Appeal*, 108 Mich., 454; *In re Calkins*, 112 Cal., 296; *Pemberton's Case*, 40 N. J. Eq., 520; *Middleditch v. Williams*, 45 N. J. Eq., 726; *Whitman v. Morey*, 63 N. H., 448; *Hill v. Bahrns*, 158 Ill., 314; *Doherty v. Gilmore*, 136 Mo., 414; *Cudney v. Cudney*, 68 N. Y., 148; *Herster v. Herster*, 122 Pa. St., 239; *Kaufman v. Caughman*, 27 S. E. Rep. [S. Car.], 16; *Richardson v. Richardson*, 35 Vt., 238; *Chaddick v. Haley*, 81 Tex., 617; *Kirkpatrick v. Jenkins*, 96 Tenn., 85; *Marx v. McGlynn*, 88 N. Y., 357; *Mooney v. Olson*, 22 Kan., 69.

What a person said "recently after" or "recently before" making a will does not become a part of the *res gestæ*. The test is: does it (the main fact and the declaration) constitute one continuous transaction? *Collins v. State*, 46 Neb., 37; *Fund v. Inhabitants of Tyngsborough*, 9 Cush. [Mass.], 86; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y., 274; *Commonwealth v. Hackett*, 2 Allen [Mass.], 136; *Rockwell v. Taylor*, 41 Conn., 55; *Tilson v. Terwilliger*, 56 N. Y., 273; *Leahy v. Cass Ave. & F. G. R. Co.*, 97 Mo., 163; *People v. Lane*, 100 Cal., 379; *Cleveland C. & C. R. Co. v. Mara*, 26 Ohio St., 185; *Tennis v. Inter-State C. R. I. R. Co.*, 45 Kan., 503; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St., 113; *People v. Dewey*, 2 Idaho, 79; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind., 566.

The *res gestæ* ordinarily does not go from the place where the main act took place; and never where the main act was completed before the principal actors go from the place where it occurred. *Mutcha v. Pierce*, 49 Wis., 231; *Durkee v. Central P. R. Co.*, 69 Cal.,

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533; *Cushing v. Willard*, 11 Gray [Mass.], 247; *Rhutasel v. Stephens*, 68 Ia., 627; *Goff v. Sloughten*, 78 Wis., 106; *Merkle v. Township of Burlington*, 58 Mich., 156; *Ohio & M. R. Co. v. Stein*, 133 Ind., 243; *Commonwealth v. Harwood*, 4 Gray [Mass.], 41; *People v. Lane*, 100 Cal., 379; *The T. & H. Pueblo Building Co. v. Klein*, 5 Colo. App., 348; *Shoecraft v. State*, 137 Ind., 443; *Bradberry v. State*, 22 Tex. App., 273; *State v. Martin*, 124 Mo., 514.

If the surrounding acts or declarations will not harmonize with the act in question so as to make a composite whole, they are inadmissible. Gillett, Indirect and Collateral Evidence, section 243; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. [Mass.], 36; *Tilson v. Terwilliger*, 56 N. Y., 273; *Moore v. Mcacham*, 10 N. Y., 207; *Miller v. State*, 8 Gill. [Md.], 141; *Equitable M. A. Association v. McCluskey*, 1 Colo. App., 473; *Enos v. Tuttle*, 3 Conn., 247; *State v. Dougherty*, 17 Nev., 376; *People v. Dewey*, 2 Idaho, 79.

A testator cannot revoke his will by parol under section 132, chapter 23, Compiled Statutes. This statute was binding on the testator, regardless of what his intentions were or might have been in respect thereto and also binding on every one else, at least every one connected with this lawsuit. 1 Stimson, American Statute Law, section 2672; *Blanchard v. Blanchard*, 32 Vt., 62; *Mundy v. Mundy*, 15 N. J. Eq., 290; *Clingan v. Mitcheltrec*, 31 Pa. St. 25; *Goodsell's Appeal*, 55 Conn., 171; *Taylor v. Pegram*, 151 Ill., 106; *Graham v. Burch*, 47 Minn., 171; *Ladd's Will*, 60 Wis., 187; *Gains v. Gains*, 2 A. K. Marsh. [Ky.], 190; *Hise v. Fincher*, 10 Ired. Law [N. Car.], 139; *Slaughter v. Stephens*, 81 Ala., 418; *Kent v. Mahaffey*, 10 Ohio St., 204; *Jones v. Moseley*, 40 Miss., 261; *Wittman v. Goodhand*, 26 Md., 95; *Kennedy v. Upshaw*, 64 Tex., 412; *Delafield v. Parish*, 25 N. Y., 9; *Perjue v. Perjue*, 4 Ia., 520.

*J. L. McPhcely and Hall & Reed, contra.*

The declarations of the deceased were admissable as

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showing the state of his mind in so far as this was material to the issue of undue influence. *Barbour v. Moore*, 4 App. Cas. [D. C.], 535; *Mooney v. Olsen*, 22 Kan., 67; *Waterman v. Whitney*, 11 N. Y., 157; *Shailer v. Bumstead*, 99 Mass., 112; Woerner, American Law of Administration, section 225; *Hindman v. Van Dyke*, 153 Pa. St., 243; *Bush v. Delano*, 71 N. W. Rep. [Mich.], 628; *Beaubien v. Cicotte*, 12 Mich., 459; *Haines v. Hayden*, 95 Mich., at page 340; 27 Am. & Eng. Ency. Law [1st ed.], 505; *Harring v. Allen*, 25 Mich., at page 508; *Collins v. State*, 46 Neb., 37.

The declaration, to be a part of the *res gestæ*, need not be coincident in point of fact with the main fact proved. It is enough that the two are so closely connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. *Missouri P. R. Co. v. Baier*, 37 Neb., 235; Bradner, Evidence, 346; *Rockwell v. Taylor*, 41 Conn., 55; *Tilson v. Terwilliger*, 56 N. Y., 273; *Commonwealth v. Hackett*, 2 Allen [Mass.], 136; 1 Greenleaf, Evidence, 108; Bradner, Evidence, 342; *Commonwealth v. Mullen*, 150 Mass., 394; *Keyes v. State*, 122 Ind., 527; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St., 113; *Rains v. State*, 88 Ala., 91; *People v. O'Neill*, 112 N. Y., 355; Bradner, Evidence, 345; *Woodbury v. Woodbury*, 5 N. E. Rep. [Mass.], 275; *Parsons v. Parsons*, 21 N. W. Rep. [Ia.], 570.

An instruction to the jury that to set aside a will because of undue influence, it must be shown that the circumstances of its execution are inconsistent with any other hypothesis than such undue influence, is erroneous. *Gay v. Gillilan*, 92 Mo., 250.

## HASTINGS, C.

This case is much simplified by the fact that the contestants of the will put their case on the sole ground that the will of Gustaf Davidson, propounded by his widow and her children, was the result of undue influence on her and their part. It is conceded that the burden of proof was upon the contestants, children by a former wife, to

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establish such undue influence. It is contended by the plaintiff in error, proponent of the will below, that there is no competent evidence to sustain the finding of the jury in favor of contestants. It is also contended that there were certain errors in the admission and rejection of testimony, and in the instructions of the court.

Gustaf Davidson on June 25, 1890, eight and one-half years before his death, being then a well-to-do farmer of Phelps county, about sixty-nine years of age, accompanied by a friend named Worden, appeared at the office of P. O. Hedlund, of Holdrege, a lawyer and banker, and procured a will to be drawn up. He signed it and procured its signature by Worden and Hedlund, bequeathing all his property after the payment of his debts to his wife and his nine children by her, giving to the wife possession of all the property, the same not to be divided or distributed in her lifetime. She was to have full control of it without bond except that she could convert it into money, only so far as might be necessary to provide for herself and the children while they should remain at home. Any of the children leaving home were to forfeit all claim of support from the property and the property was not to be divided until the wife should die or remarry. The will contained a proviso, as follows: "Third. I hereby totally disinherit the following named, my children with my former wife, viz.: Andrew, Christine, Emily and John. I do this from no ill-will but from the fact that each of them is quite comfortably situated and I have given to each of them all substantial assistance to which I deem them entitled and I hereby direct that they shall receive nothing from the property of which I may be possessed at my death."

It appears from the testimony of the subscribing witness, Hedlund, that the will was dictated either by the testator himself or by Worden; that testator fully understood it; that its provisions were discussed, and that it was made as he desired to have it. The other subscribing witness, Worden, testifies to the execution of the will; that it may have been read over to the testator, but he

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thinks not, and he thinks twenty minutes, possibly fifteen minutes, after they left the bank, in a stairway leading to Worden's room, the testator said to him:

"'Mr. Worden, one of my children is so close to me as another, and what I have told you I want you to remember, and do what I ask of you.' Mr. Davidson wanted me, if I lived longer than he did, to see that all his children had justice and rights, because one was the same as the other. \* \* \* He stuck to it at all times; he wanted all to have the same—one child the same as another. \* \* \* He said that the will was made to keep peace in his family; he said a great deal about one of his boys, and that was the oldest one by the second wife, Albert; this son caused a great deal of hardness between him and his wife. He said then that this will was made to try and live in peace, anyway, and if I died before he did, then they might fight it out. \* \* \* It was a will on paper, but it was not his intention; it was not his heart's desire by any means. \* \* \* That is was not his wishes—not his heart's wishes—that he had made that will. \* \* \* It was to keep peace in the family."

It appears that this witness could not understand the Swedish language, and the testator by preference used that language and usually spoke in it when talking with Swedes, and the other subscribing witness, Hedlund, was of that nationality. It also appears that Worden was totally deaf in his left ear and partly so in the right. One witness, Renquist, relates of testator's staying over night with him on one occasion, in 1897, and at that time he complained a good deal of his relations with his family; he said if he had \$1,000 he would never go to stay with them again for he could not stand the pressure, and that "when he left my house he would go right to Holdrege and get his divorce, for he couldn't stand it any longer." The same witness relates a subsequent conversation at Davidson's house, where he complained of his oldest son by the second wife, Albert, carrying away property given him by his mother. Testator then said, as stated by the witness,

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"that when Albert drove away he told the old lady that he didn't want to see that any more; that they shall not give one of the children any more than the rest of them; they should leave the property the way it is until after our death, then all shall have equal share. All our children shall have an equal share." Renquist's wife testifies to a similar conversation, except that her statement indicates Davidson spoke of "my children," instead of "our children." A son-in-law, Carlson, testifies to a good deal of trouble between the testator and his wife in reference to the conveyance of a farm to the son, Albert, in the year 1895, but relates absolutely nothing with reference to any will. Some hundreds of pages of evidence were taken from forty-three witnesses sworn, but the only direct reference to the will, the only testimony tending in any way to establish any endeavor on the part of the beneficiaries to induce the making of this will, has been stated. The rest of the contestants' evidence relates to the general management of the business of the farm, and indicates a general participation in it on the part of the entire family, especially the wife, with some disagreements, but on the whole a decided authority and control on the part of the testator down to the end of his life. The family of testator at the time of making the will consisted of two sons and two daughters by a former wife, all of whom were married and settled in his neighborhood. There was also his wife and present widow, the proponent, Caroline Davidson, and her nine children, all of whom are expressly named in the will and of whom the three youngest were then aged seven, six and three years respectively. As before stated he was then sixty-nine years of age, and Mr. Hedlund states was not robust. It appears that for many years he had done very little work on the farm himself but "went around and looked after it." A witness testifies that about two years before his death he came to witness' office in Holdrege and asked to get some writing done and was asked if it was a will, and replied, "No, I have one." During his last illness, his physician, Dr. Sundbury, informed

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him of his critical situation and told him if his business affairs were not arranged he had better "straighten them up." "He just stated that his affairs were all right." This was in December, 1898, and he died January 11, 1899.

The court at the trial gave an instruction, No. 14, to which no exception was taken. It was to the effect that a will can not be set aside by the declarations of the testator alone, that such evidence was not admitted for the purpose of showing undue influence, but the condition of testator's mind. If the jury found the declarations had been made they might be considered together with the other evidence to corroborate other proof, but were not sufficient of themselves to sustain the charge of undue influence. Applying this doctrine to the case it certainly seems that there is no evidence of undue influence here. There are two things and no more in this case to which appeal can be made. One, the declarations of the testator, and the other the disinheriting of the older children. It cannot be said that the latter action on the part of an old man with a young family and a wife, whose business ability, at all events, is unquestioned, is so unreasonable as to call for explanation. If one was needed it seems to be found in an almost morbid desire that the property he had accumulated should be kept together. That he should provide for its remaining together during the mother's lifetime and go to provide for his young family in preference to the self-dependent children is not a circumstance which can be allowed weight as independent proof of coercion.

The declarations of the testator to the witness, Worden, can not be held admissible as *res gestæ*. They were evidently no part of the making of the will. They occurred at a different place, in the absence of the other subscribing witness, and after the complete execution of the instrument and as far as they go recognize it as already made. The declarations are of no more force than if made at any subsequent time, except as their nearness to the time of making the will makes their application to it



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more vivid. They are no more a part of the transaction of making the will than if made the next day, or for that matter the next year. It seems to have been error, therefore, to characterize these declarations made a short time after the completion of the will as a part of the *res gesta*.

Many distinguished writers have regretted that English and American law does not allow the statements of deceased persons of good credit as to matters within their knowledge and as to which they had no motive to falsify to be given in evidence to establish the truth of the thing stated. It is not believed, however, that any good authority for so doing can be cited from the courts and certainly none is disclosed by the able and exhaustive briefs of counsel in this case. It seems clear therefore that, at the very utmost, these declarations of the testator were only admissible for the purpose of disclosing the state of his mind thus shortly after making the will. That is, they could be used if there was independent proof of coercion to show that the action of making the will was influenced by such coercion. They are no proof of such coercion itself nor of the truth of the statement that the object was to keep peace in the family. As before stated, without these declarations there is absolutely no proof of coercion or undue influence. All of the other evidence is fully as compatible with the hypothesis that the will was not desired by the proponent, but was reluctantly accepted by her instead of the immediate assistance to her sons, which there is some indication that she desired. There being no independent evidence of undue influence the admission of these declarations was error. The peremptory instruction for a verdict asked by plaintiff should have been given.

It would seem also that the learned trial court erred in permitting the contesting sons and daughters to testify as to what they had received from their father. Section 329 of the Code provides that no one having a direct legal interest in an action against a representative of a deceased person shall testify to any transactions with



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deceased unless his evidence or that of some witness as to such transactions has been introduced by the opposing party. The evidence was admitted and is sought to be justified as contradicting the recital in the will. This recital was apparently deemed by the learned trial court to be equivalent to evidence of the deceased. It does not seem possible to so regard it. Contestants are denying this is testator's will, and claiming it was the result of coercion. Until it shall be established as such will it is no more than a claim and is no more proof of its recitals than is the petition for its probate.

Instruction No. 12, asked by the contestants and given by the court, seems somewhat too broad and liable to be prejudicial, especially in view of the admission of testator's declarations. It is in effect that if the testator made the will only for the purpose of keeping peace in the family the verdict should be for contestants. This can hardly be the law. Keeping peace in one's family can scarcely be an unlawful or immoral object. There would seem to be no legal objection to testator devising his property for that sole purpose if he deliberately concludes of his own free will that such is his best policy. Of course, he must not have been coerced into making it. The peace which alone it is sought to restore must not have been broken in order to force the making of such a will, but the peace of a family is often disturbed over other matters than wills. The right to freely dispose of one's property must include the right to do so in such a way as to maintain family peace and even the making of that one's sole object. In this case, if the wife was insisting, as was her right, upon present help being given to these maturing sons, why might not the father instead of yielding to her wishes, make this will? If he did it without solicitation or request from her and at his suggestion she accepted it as a substitute for her real wish, what possible objection could be urged against it? Would it make any difference that his sole motive was desire to escape from the importunity for immediate assistance,

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provided that such importunity had been raised with no such object in view?

It is asked that this court reinstate the probate of the will allowed by the county court and enter final judgment in this cause. This request is based upon section 594 of the Code providing for such judgment to be rendered here as the trial court should have rendered, or that the cause be remanded. Without at this time indicating what power this court has to enter a judgment without at least a formal verdict, in a jury case, where there has been no waiver of a jury trial, it would seem that justice requires that contestants, if they desire, be permitted an opportunity to present their evidence in accordance with the views herein expressed.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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W. S. FISK, APPELLEE, v. MARY K. OSGOOD ET AL., APPELLANTS, ET AL., IMPLEADED WITH SARAH M. WRIGHT ET AL., APPELLEES.

FILED NOVEMBER 20, 1901. No. 11,972.

Commissioner's opinion. Department No. 1.

1. **Courts: NUNC PRO TUNC ORDER: AUTHORITY OF COURTS TO GRANT.**  
The authority of courts both of law and equity to enter judgment or decree *nunc pro tunc*, is an inherent power. *Van Etten v. Test*, 49 Neb., 725, followed.
2. **Change of Journal Entry After Approval: VALIDITY.** Every change made by the clerk in a journal entry, previously approved by the court, is void unless made in pursuance of section 604 of the Code of Civil Procedure.

APPEAL from the district court for Johnson county.  
Tried below before STUBBS, J. *Reversed.*

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*Daniel F. Osgood and S. P. Davidson, for appellants.**Kelligar & Ferneau and Hugh La Master, contra.*

DAY, C.

W. S. Fisk brought this suit in the district court for Johnson county against Mary K. Osgood and Daniel F. Osgood to foreclose a mortgage on the east half of lots 4 and 5 in block 8 of Kershaw's addition to the city of Tecumseh. The county of Johnson and Sarah M. Wright were also made parties defendants. The county answered setting up its lien for delinquent and unpaid taxes for several years on the east half of lots 3, 4 and 5 of said block. Sarah M. Wright answered and set up by way of cross-petition a prior mortgage upon the east half of lots 3, 4 and 5. Defenses were interposed by the Osgoods. The cause was tried to the court, whose findings, so far as they are pertinent to the questions presented by this appeal, are as follows: "There is due the county of Johnson on the tax lien set up in the cross-petition the sum of \$194.62, which is a first lien on the premises described in plaintiff's petition. \* \* \* There is due the defendant, Sarah M. Wright, \* \* \* the sum of \$113.33; \* \* \* that in order to secure the payment of said note, the defendant, D. F. Osgood \* \* \* executed and delivered a mortgage upon the premises described in plaintiff's petition, \* \* \* and that the same is a second lien upon said premises subject and inferior to the lien of the county; \* \* \* that there is due the plaintiff on the note set up in the petition the sum of \$630.62; \* \* \* that the Osgoods executed and delivered" a mortgage on the premises described in the petition. On these findings the court decreed that unless the said sums were paid by the Osgoods within twenty days their equity of redemption be foreclosed on said premises to-wit: "The east one-half of lots 4 and 5 in block 8 of Kershaw's addition \* \* \* shall be sold." An appeal from this decree was taken by Mary K. Osgood and affirmed in this court, being reported in 58 Neb., 486.

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After certifying the transcript of the record on that appeal, the clerk of the district court, apparently without the knowledge of any of the parties to the action or the court, took the liberty of interpolating, in that portion of the decree ordering a sale, the word and figure "three (3)" in the description of the property, thus making the decree read, the east one-half of lots 3, 4 and 5, instead of the east one-half of lots 4 and 5. An order of sale was thereupon issued to the sheriff describing the property to be sold as the east one-half of lots 3, 4 and 5, and under this order of sale the said premises were sold to the plaintiff.

Mary K. Osgood filed objections to the confirmation of the sale, the basis of the objection being that the sale was of the east half of lots 3, 4 and 5, whereas the decree, as entered, did not include or create a lien upon the east half of lot 3. Before the objections to the confirmation were heard, the plaintiff filed a motion for a *nunc pro tunc* entry of decree, and upon hearing evidence as to the original decree, the court found that the decree as pronounced on January 31, 1896, covered and included the east half of lots 3, 4 and 5 in block 8, and that it was not recorded as rendered, but by inadvertence the east one-half of lot 3 was omitted in the description of the property ordered to be sold by the decree. The court thereupon ordered that the journal entry be amended as of date January 31, 1896, to read as follows: "It is therefore considered, ordered, adjudged and decreed by the court that unless the defendants, D. F. Osgood and Mary K. Osgood, shall within twenty days from the entry hereof pay \* \* \* the defendants', Mary K. Osgood's and Daniel F. Osgood's, equity of redemption be foreclosed on said premises to-wit: The east half of lots 3, 4 and 5 in block 8 \* \* \* shall be sold." As a part of the same order, the court overruled the objections to the confirmation and confirmed the sale. From this order of confirmation and from the *nunc pro tunc* decree, Mary K. Osgood appeals.

The rule is well established that courts have inherent

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power to make a *nunc pro tunc* order. If a judgment in fact was rendered, if an order was made and such judgment or such order be not properly recorded, it is competent for the court at any time afterwards, in a proper proceeding and upon a proper showing to render *nunc pro tunc* the judgment or order actually made. *Van Etten v. Test*, 49 Neb., 725; *Belkin v. Rhodes*, 76 Mo., 643; *Gibson v. Chouteau's Heirs*, 45 Mo., 171; *Wachsmuth v. Orient Ins. Co.*, 49 Neb., 590.

We think it is clear from the entire record that the *nunc pro tunc* decree is wrong, as it gives the plaintiff a lien upon the east one-half of lot 3, whereas his mortgage did not include lot 3. The plaintiff had no lien upon this lot and it should not have been sold to satisfy his mortgage. It is apparent that what was intended was to create a first lien in favor of the county upon lots 3, 4 and 5 and a second lien upon the same property in favor of Sarah M. Wright, and a third lien in favor of the plaintiff upon lots 4 and 5. The decree should have made suitable provisions for the appraisement and sale of lot 3 and the distribution of the proceeds of the sale thereof separate from the sale of lots 4 and 5. There is some uncertainty as to the time when the change was made in the decree, but not as to the mode. It was made by the clerk without notice to the parties and without direction of the court. The clerk testified on the hearing that he made the change within a few days after the entering of the original decree; that was on January 31, 1896, and, yet, on June 17, 1896, the same clerk certified the record of the case to this court, in which the decree was recited as it had first been spread on the journal; that was the decree before this court and which was by this court affirmed.

Section 604 of the Code provides as follows: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action." Any change or correction in the

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journal as approved by the clerk otherwise than in accordance with the requirements of this provision of the statutes is void. It is therefore recommended that the order of the district court entering the *nunc pro tunc* decree be reversed and that the order confirming the sale be reversed at the costs of the plaintiff, commencing with the issuance of the order of sale; that plaintiff have permission to apply for a *nunc pro tunc* order correcting the decree and findings entered January 31, 1896, to conform to the facts found, and that a reappraisement and sale be ordered.

It is therefore recommended that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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**THE FIRST NATIONAL BANK OF HASTINGS, NEBRASKA, v.  
THE FARMERS & MERCHANTS BANK OF PLATTE CENTER,  
NEBRASKA, ET AL.**

FILED NOVEMBER 20, 1901. No. 12,049.

Commissioner's opinion. Department No. 2.

1. **Election to Plead Over: EFFECT.** Having elected to plead over plaintiff cannot open up for review the order of the court in sustaining a demurrer to his petition.
2. **Rule When Amended Petition is Filed.** This waiver also attaches to an amended petition which is filed after demurrer and which is similar in all material respects to, and contains no averments different from those contained in the original petition.
3. **Bills and Notes: INDORSEMENT "FOR COLLECTION": NOTICE.** An indorsement of a draft to a bank "for collection" is notice to subsequent holders that the indorsee is agent and not owner of the draft.
4. **"The Law of the Case": DEFINITION AND APPLICATION.** "The law of the case" is a rule of expediency which should not be lightly disregarded, but it should be restricted to such questions as have been presented to, and decided by, this court at the former hearing of the same case and those necessarily involved in such de-

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cision and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only and not determined.

**ERROR** from the district court for Platte county. **Tried** below before GRIMISON, J. *Affirmed.*

*J. B. Cessna*, for plaintiff in error.

The indorsements of a check by a payee may be said ordinarily to be a guarantee of the genuineness of the indorsements theretofore on the paper. *People's Bank v. Franklin Bank*, 12 S. W. Rep. [Tenn.], 716, 3 Am. & Eng. Ency. Law, 223, 225; *Turnbull v. Bowyer*, 40 N. Y., 456; *Susquehanna Bank v. Loomis*, 39 Am. Rep. [N. Y.], 652; *White v. Continental National Bank*, 64 N. Y., 316.

By adding "for collection" or "on account" to the indorsement, a bank simply restricts the negotiability of a draft and does not relieve itself from its warranty that the payee's indorsement is genuine. *First National Bank of Belmont v. First National Bank of Barnesville*, 50 N. E. Rep. [Ohio], at pages 724, 725; *Northwestern National Bank of Chicago v. Bank of Commerce*, 17 S. W. Rep. [Mo.], 982-984; *Rhodes v. Jenkins*, 31 Pac. Rep. [Colo.], 491; *First National Bank of Crawfordsville v. Indiana National Bank*, 30 N. E. Rep. [Ind.], 808; *Indiana National Bank of Lafayette v. First National Bank*, 36 N. E. Rep. [Ind.], 382, 383; *Citizens' National Bank of Davenport v. City National Bank*, 82 N. W. Rep. [Ia.], 464; *First National Bank of Chicago v. Northwestern National Bank*, 29 N. E. Rep. [Ill.], 884; *Rossi v. National Bank of Commerce*, 71 Mo. App., 150; *National Bank of North America v. Bangs*, 106 Mass., 441; *Star Fire Ins. Co. v. New Hampshire National Bank*, 60 N. H., 442; *Wilson v. Smith*, 3 How. [U. S.], 763; *Birmingham National Bank v. Bradley*, 15 So. Rep. [Ala.], 440; *Sweeney v. Easter*, 1 Wall. [U. S.], 166.

A plaintiff having paid money on a draft upon which



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there was a forged indorsement can recover back from a bank which had received said draft for collection on account for money had and received, or for money paid by mistake. *Citizens' National Bank of Davenport v. City National Bank*, 82 N. W. Rep. [Ia.], 464; *Bank of Commerce v. Union Bank*, 3 N. Y., 230; *Bank of Orleans v. Smith*, 3 Hill [N. Y.], 560; *Canal Bank v. Bank of Albany*, 1 Hill [N. Y.], 287; *National Bank of North America v. Bangs*, 106 Mass., 441; *People v. Bank of North America*, 75 N. Y., 547; *Birmingham National Bank v. Bradley*, 15 So. Rep. [Ala.], 440-444; *Levy v. First National Bank*, 27 Neb., 557, 43 N. W. Rep., 354; *Vagliano Brothers v. Bank*, 23 Q. B. Div. [Eng.], 243; *Irving Bank v. Wetherald*, 36 N. Y., 335; *Espy v. Bank of Cincinnati*, 18 Wall. [U. S.], 604.

Money paid by the drawee to an innocent holder upon a forged indorsement may be recovered back. 4 Am. & Eng. Ency. Law [2d ed.], 501, 502 and note; *Espy v. Cincinnati Bank*, 18 Wall. [U. S.], 604; *First National Bank v. Northwestern National Bank*, 38 N. E. Rep. [Ill.], 739; *McKleroy v. Southern Bank*, 74 Am. Dec. [Ky.], 438; *Third National Bank of St. Louis v. Allen*, 59 Mo., 310; *Canal Bank v. Bank of Albany*, 1 Hill [N. Y.], 287; *Chambers v. Union National Bank*, 78 Pa. St., 205.

The indorsement of the United States National Bank, although not a passing of title was an assurance of title and right to collect, and was, therefore, a guarantee of the previous signatures. *Tannatt v. Rocky Mountain National Bank*, 9 Am. Rep. [Colo.], 157; *Morgan v. Bergen*, 3 Neb., 209; *Sturdevant v. Hull*, 8 Am. Rep. [Me.], 409; *Fiske v. Eldridge*, 12 Gray [Mass.], 474.

If indorser signs merely his own name, he will be personally liable, even though he appears in the body of the instruments as acting as agent. 1 Am. & Eng. Ency. Law [2d ed.], 1044; *Bank of Genesee v. Patchin Bank*, 19 N. Y., 312.

Some authorities hold the title does not pass by in-



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dorsement for collection or on account, that such indorsee is agent of the first; that transfer is no guarantee of previous signatures; and that, if agent pays over funds before notice, the remedy is against the principal alone. *United States v. American Exchange National Bank*, 70 Fed. Rep., 232; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S., 50; *White v. National Bank*, 102 U. S., 658; *Sweeney v. Easter*, 1 Wall. [U. S.], 166; *Wells, Fargo & Co. v. United States*, 45 Fed. Rep., 337; *National Park Bank v. Seaboard Bank*, 20 N. E. Rep. [N. Y.], 632; *United States National Bank v. National Park Bank*, 13 N. Y. Supp., 411; *United States National Bank v. National Park Bank*, 29 N. E. Rep. [N. Y.], 1028.

Upon a second trial of a cause the court will examine the whole record including its opinion to see what questions have been presented by the pleadings on the first trial and necessarily decided or necessarily involved and will apply the law of the case. *McKinlay v. Tuttle*, 42 Cal., 571; *Troup v. Horbach*, 53 Neb., 795, 78 N. W. Rep., 286; *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb., 406, 83 N. W. Rep., 202; *Motley v. Motley*, 60 Neb., 593, 83 N. W. Rep., 830; *State v. Omaha National Bank*, 60 Neb., 232, 82 N. W. Rep., 850; *Lillie v. Trentman*, 29 N. E. Rep. [Ind.], 405; *Little Rock Cooperage Co. v. Hodge*, 34 S. E. Rep. [Ga.], 667; *City of Logansport v. Humphreys*, 6 N. E. Rep. [Ind.], 337; *Dyer v. Ambleton*, 19 S. W. Rep. [Ark.], 574; *Home Fire Insurance Co. v. Johansen*, 59 Neb., 349, 80 N. W. Rep., 1047; *Richardson Drug Co. v. Teasdall*, 59 Neb., 150, 80 N. W. Rep., 494; *Hayden v. Frederickson*, 59 Neb., 141, 80 N. W. Rep., 494; *Nelson v. Bevins*, 19 Neb., 715; 28 N. W. Rep., 331; *Pinkham v. Pinkham*, 60 Neb., 600, 83 N. W. Rep., 837; *Wittenberg v. Mollyneaux*, 60 Neb., 583, 83 N. W. Rep., 842; *Todd v. Houghton*, 59 Neb., 538, 81 N. W. Rep., 508; *Ripp v. Hale*, 45 Neb., 567, 64 N. W. Rep., 454; *Barker v. Wheeler*, 60 Neb., 470, 83 N. W. Rep., 678; *Coburn v. Watson*, 48 Neb., 257, 67 N. W. Rep., 171; *Fuller v. Cunningham*, 48 Neb., 857; *Motley*

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*v. Motley*, 60 Neb., 593, 83 N. W. Rep., 830; *Mead v. Tzschuck*, 57 Neb., 615, 78 N. W. Rep., 262.

"The law of the case" applies to all matters either actually brought forward or such as might have been brought forward and litigated. When the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal rules the case throughout all its subsequent stages. "Every argument made here could have been made on a former hearing, and if well founded would have resulted in the affirmance of the former judgment. The defendants had full opportunity to urge these objections on the former appeal. Having failed to rely upon the error, if error it is, they must be regarded as having waived their right to do so on a subsequent appeal."

*Cromwell v. County of Sac*, 94 U. S., 351; *Richter v. Leiby's Estate*, 83 N. W. Rep. [Wis.], 694; *Dilworth v. Curts*, 139 Ill., 508, 29 N. E. Rep., 861; *Barker v. Wheeler*, 60 Neb., 470, 83 N. W. Rep., 678; *Gregory v. Kenyon*, 34 Neb., 640-649; *Omaha Life Insurance Co. v. Kettenbach*, 55 Neb., 330, 75 N. W. Rep., 827; *Wittenberg v. Mollyneaux*, 60 Neb., 583, 83 N. W. Rep., 842; *Mead v. Tzschuck*, 57 Neb., 615, 78 N. W. Rep., 262; *Tzschuck v. Mead*, 47 Neb., 260, 66 N. W. Rep., 428; *Nelson v. Bevins*, 19 Neb., 715, 28 N. W. Rep., 331; *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb., 740; *Ripp v. Hale*, 45 Neb., 567, 64 N. W. Rep., 454; *Todd v. Houghton*, 59 Neb., 538, 81 N. W. Rep., 508; *Chouteau v. Gibson*, 76 Mo., 38; *Nickless v. Pearson*, 26 N. E. Rep. [Ind.], 478; *Metropolitan Bank v. Taylor*, 62 Mo., 338; *Herman, Estoppel and Res Adjudicata*, 117-118, 548-549; *Crockett v. Gray*, 31 Kan., 246; *O'Brien v. Mancaring*, 81 N. W. Rep. [Minn.], 746; *Sayers v. Auditor General*, 82 N. W. Rep. [Mich.], 1045; *Smyth v. Neff*, 17 N. E. Rep. [Ill.], 702; *Ogden v. Larrabee*, 70 Ill., 510, 513; *Ficener v. Bott*, 47 S. W. Rep. [Ky.], 251; *South Bend Plow Co. v. Cribb Co.*, 81 N. W. Rep. [Wis.], 675; *Ellis v. Northern P. R. Co.*, 50 N. W.

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Rep. [Wis.], 397; *Fire Department of Oshkosh v. Tuttle*, 7 N. W. Rep. [Wis.], 549; *Quackenbush v. Wisconsin & M. R. Co.*, 37 N. W. Rep. [Wis.], 834; *Schoenleber v. Burkhardt*, 69 N. W. Rep. [Wis.], 343; *Noonan v. Orton*, 27 Wis., 300; *Trustees of School District No. 28 v. Stocker*, 42 N. J. Law, 115; *Thompson v. Myrick*, 24 Minn., 4; 3 American Century Digest, sections 4356, 4358, 4364; *Fargerson v. Smith*, 3 N. E. Rep. [Ind.], 866; *McKinney v. State*, 19 N. E. Rep. [Ind.], 613; *City of Longsport v. Humphreys*, 6 N. E. Rep. [Ind.], 337; *Test v. Larsh*, 76 Ind., 452; *Cramer v. Stone*, 38 Wis., 259; *Krise v. Ryan*, 19 S. E. Rep. [Va.], 783; *Findlay v. Trigg's Admr.*, 3 S. E. Rep. [Va.], 142; *Lillie v. Trentman*, 29 N. E. Rep. [Ind.], 405; *Aurora City v. West*, 7 Wall. [U. S.], 82; *Chaffin v. Taylor*, 6 Sup. Ct. Rep., 518-520; *Furth v. Snell*, 43 Pac. Rep. [Wash.], 935; *Brusie v. Gates*, 31 Pac. Rep. [Cal.], 111; *Thatcher v. Gottlieb*, 59 Fed. Rep., 872; *Heinlen v. Martin*, 59 Cal., 181; *Chaffin v. Taylor*, 116 U. S., 567; *Roberts v. Moody*, 83 N. W. Rep. [Wis.], 307; *Portland Trust Co. v. Coulter*, 31 Pac. Rep. [Ore.], 80; *Dodge v. Gaylord*, 53 Ind., 365; *Newberry v. Blatchford*, 106 Ill., at page 593; *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413; *Barney v. Winona & St. Peter R. Co.*, 117 U. S., 228, 6 Sup. Ct. Rep., 654; *West v. Douglas*, 34 N. E. Rep. [Ill.], 141; *Jaffe v. Skae*, 48 Cal., 540; *Harmòn v. Auditor*, 13 N. E. Rep. [Ill.], 161; *Beloit v. Morgan*, 7 Wall. [U. S.], 619; *Seabright v. Seabright*, 10 S. E. Rep. [W. Va.], 265; *McCoy v. McCoy*, 2 S. E. Rep. [W. Va.], 809; *Mygatt v. Coe*, 42 N. E. Rep. [N. Y.], 17; *Davidson v. Dallas*, 15 Cal., 75; *Lowry v. Davenport*, 7 S. E. Rep. [Ga.], 91; *Mitchell v. Davis*, 23 Cal., 381; *Ellis v. State Insurance Co.*, 27 N. W. Rep. [Ia.], 762; 3 American Century Digest, section 4360; *Polack v. McGrath*, 38 Cal., 666; *McFall v. Iowa Central R. Co.*, 73 N. W. Rep. [Ia.], 355; *Ruegger v. Indianapolis & St. Louis R. Co.*, 103 Ill., 449; *Briscoe v. Lloyd*, 64 Ill., at page 35; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. Rep., 980; *Everill v. Swan*, 57 Pac. Rep. [Utah],

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716; *Peay v. Salt Lake City*, 40 Pac. Rep., 206; *Hamilton v. Quimby*, 46 Ill., 90; *Stocton v. Ford*, 18 How. [U. S.], 418, 420; *Indiana, B. & W. R. Co. v. Koons*, 105 Ind., 507; *Kilander v. Hoover*, 11 N. E. Rep. [Ind.], 796; *Felton v. Smith*, 88 Ind., 149; *Slater v. Skirving*, 51 Neb., 108, 70 N. W. Rep., 493; Herman, Estoppel and Res Adjudicata, pp. 128-131, sections 457, 561, pp. 280-2, 312, 160-162; *Henderson v. Henderson*, 3 Hare [Eng.], at page 115; *Aurora City v. West*, 7 Wall. [U. S.], 82; *Gould v. Evansville & C. R. Co.*, 91 U. S., 526, 533; *Stafford v. Clark*, 2 Bing. [Eng.], 374; *Miller v. Covert*, 1 Wend. [N. Y.], 487; *Bagot v. Williams*, 3 B. & C. [Eng.], 235; *Roberts v. Heim*, 27 Ala., 678.

*Hamilton & Maxwell, contra.*

A restrictive indorsement of negotiable paper does not pass the legal title to the paper, and under such indorsement the indorsee is a mere agent. *United States National Bank of Omaha v. Geer*, 55 Neb., 462; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S., 50; *Sweeny v. Easter*, 1 Wall. [U. S.], 166; *White v. Miners National Bank*, 102 U. S., 658; *National Park Bank v. Seaboard Bank*, 114 N. Y., 28; *National City Bank v. Westcott*, 118 N. Y., 468; *Wells, Fargo & Co. v. United States*, 45 Fed. Rep., 337.

Having elected to plead over, the plaintiff cannot open up for review the order of the court sustaining a demurrer to the petition. *Wheeler v. Barker*, 51 Neb., 846; *Buck v. Reed*, 27 Neb., 67; *Cox v. Peoria Mfg. Co.*, 42 Neb., 660; *Grotte v. Nagle*, 50 Neb., 363; *Citizens State Bank v. Pence*, 59 Neb., 579; *Garanflo v. Cooley*, 5 Pac. Rep. [Kan.], 767.

## OLDHAM, C.

This action was brought in the court below by the plaintiff against the defendants to recover the amount of a draft payable to the order of John Baughman drawn on the plaintiff by the Nebraska Loan & Trust Company,

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which was thereafter paid by the plaintiff. This draft at the time of payment bore the indorsement of John Baughman, A. M. Swartzendruber and the defendants.

The material allegations of plaintiff's amended petition are in substance, that on August 10, 1892, the Nebraska Loan & Trust Company being indebted to one John Baughman in the sum of \$1,136 drew its check on the plaintiff for that amount payable to his order and sent it to A. M. Swartzendruber to deliver to Baughman. It is alleged that after its delivery the check was indorsed "John <sup>his</sup> × <sub>mark</sub> Baughman. Witness, A. M. Swartzendruber"; that Swartzendruber then indorsed the check "A. M. Swartzendruber"; that it was by him then presented to the Farmers and Merchants Bank of Platte Center, and it was by that bank indorsed "Pay M. T. Barlow, Cash., or order, on account Farmers and Merchants Bank, Platte Center, Nebraska, D. D. Lynch, Cash." and sent to the defendant, The United States National Bank of Omaha; that it was by the latter bank paid and indorsed "Pay First National Bank for collection and return to United States National Bank, Omaha, Nebraska, M. T. Barlow, Cash." and sent to the plaintiff, and that plaintiff, relying upon the indorsements of the defendants, the Farmers and Merchants Bank of Platte Center and the United States National Bank of Omaha, paid the same as the Nebraska Loan and Trust Company had sufficient money on deposit in plaintiff's bank for such purposes. It is also alleged that on September 14, 1892, it was discovered that the name of John Baughman on the check was a forgery, and the plaintiff believing the evidence presented to it on this point paid back to the Nebraska Loan & Trust Company the sum of \$1,136 and took an assignment of the check and notified each of the defendants of the forgery. On issues properly joined on this petition and separate answers of the defendants a trial was had in the court below, judgment was rendered for the defendants, and on proceedings in error instituted in this court the judgment was reversed and cause remanded for

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a new trial. See *First National Bank of Hastings v. Farmers & Merchants Bank of Platte Center*, 56 Neb., 149, 76 N. W. Rep., 430.

After this reversal and the filing of the mandate in the court below, the defendant, the United States National Bank, filed an amended answer setting forth, among other things, that its indorsement on the draft was a limited one, that it acted only as an agent for its co-defendant, the Farmers & Merchants Bank of Platte Center, in forwarding the check and collecting it from the plaintiff; that it never owned the instrument, never had any interest therein or in the money collected thereon, and that before it had any knowledge that there was any claim that the indorsement of the name of John Baughman on the check was a forgery, it paid all the money collected by it thereon to its principal, the Farmers & Merchants Bank of Platte Center. A reply was filed to this amended answer and subsequently, by leave of court, the answer and reply were withdrawn and the defendant, the United States National Bank, filed a demurrer to the plaintiff's amended petition on which the cause had formerly been tried, on the ground that it did not state facts sufficient to constitute a cause of action against the defendant, the United States National Bank of Omaha. This demurrer was sustained by the lower court; plaintiff thereupon asked leave to file a second amended petition.

For its second amended petition plaintiff added to the petition to which the demurrer had been sustained three paragraphs, alleging that by the holding of this court reversing the judgment of the district court in this case the liability of the United States National Bank on its indorsement of the draft had been determined, and that such determination had become the "law of the case." On motion these additional paragraphs were struck from the plaintiff's petition. Plaintiff then filed another amended and supplemental petition reiterating the same allegations. Another motion was filed to strike the allegations setting up the "law of the case" from this petition. This

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motion was a second time sustained and the plaintiff not tendering any further pleading the cause was dismissed. From this order plaintiff brings error.

The first error called to our attention is as to the action of the trial court in sustaining the demurrer to plaintiff's amended petition, but we cannot see how, under the rule announced by this court in the case of *Buck v. Reed*, 27 Neb., 67, we can consider this alleged error in view of the fact that after the demurrer was sustained plaintiff procured leave and filed a second amended petition. The rule seems to be clearly announced in the case just cited that: "To obtain the review of a decision sustaining or overruling a demurrer, the party must suffer a judgment in chief to be rendered on the demurrer; if he answers over and goes to trial upon the merits, he waives the demurrer and cannot assign the judgment upon the demurrer as error."

The next alleged error called to our attention is as to the action of the trial court in striking paragraphs eight, nine and ten from the second amended and supplemental petition. The record in this cause in the court below is so fearfully and wonderfully made that we are not free from doubt in determining what, if anything, it presents to us that can be reviewed on error under the rules of practice in this court. It appears from the record that there are two judges of the district court in which this case was tried. The demurrer to the amended petition and the motion to strike paragraphs eight, nine and ten from the second amended petition were passed upon by one of the judges and the second amended and supplemented petition, which as already stated was but a duplicate of the former petition, was presented to the other judge of said district, and in striking the same paragraphs from a copy of the same petition he appears to have been following the "law of the case" as determined by the other judge of that court.

In the case of *Wheeler v. Barker*, 51 Neb., 846, 71 N. W. Rep., 750, the court, in discussing the question of filing an



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amended petition after demurrer, says: "We think the correct view is this: that, having elected to plead over, the plaintiff cannot now open up for review the order sustaining the demurrer, but having assigned as error the striking from the files of the amended petition, she is entitled to have the ruling reviewed. If the amended petition differed in any material respect from the original, there was error in striking it from the files; but that error was not prejudicial unless the amended petition stated a cause of action." Now under this rule if the second amended petition had differed in any material respect from the original and plaintiff had stood on this petition then we could review the action of the trial court in striking the new and additional paragraphs from this petition, but plaintiff did not do this, but, after getting leave to file a second and supplemental petition, filed the same thing over again, and submitted it to another judge of the same court, and now seeks to predicate error on the action of the last judge in following the rule already established by his associate for the conduct of this case.

Under the conditions of the record we might dismiss this petition without further consideration. But plaintiff has urged a consideration of his cause with such zeal and ability that we deem it proper to briefly examine the other questions on which he relies. The indorsement on the draft by the defendant, the United States National Bank, was, as appears from plaintiff's petition, as follows: "Pay First National Bank for collection and return to United States National Bank, Omaha, Nebraska, M. T. Barlow, Cash." In the recent case of *United States National Bank v. Geer*, 55 Neb., 462, 75 N. W. Rep., 1088, this court, after a careful re-examination of the question, determined that a restricted indorsement of this character vests no general property to the paper in the indorsee, it merely constitutes him an agent for the purpose of collecting the instrument; hence if the agent has paid over the funds collected by him to his principal without notice there could be no recovery



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against him on such a restricted indorsement, even though a prior indorsement of the draft should prove to have been a forgery. It would then follow that the order of the district court in sustaining the demurrer was fully warranted, unless in the former adjudication of this cause this specific question had been determined by this court adverse to the ruling of the district court and had by such ruling become what is commonly styled the "law of the case."

This doctrine of the "law of the case" received an able and exhaustive review by this court in the case of *City of Hastings v. Foxworthy*, 45 Neb., 676, and this review by the learned commissioner leaves the question in some doubt as to whether this doctrine is a towering oak or a leafless, wind-shaken snag in the forest of jurisprudence. However, judging from the numerous references to this doctrine it seems to be well recognized by this court, and under proper restrictions we believe it to be a rule of expediency which should not be lightly disregarded; but in our view it should be restricted to such questions as have been presented to and decided by this court at the former hearing of the same case or those necessarily involved in such decision, and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only and not determined.

At the former hearing of this case the cause was reversed because of the insufficiency of the testimony to sustain defendants' plea of estoppel based on the apparent authority in the correspondent to receive the money on the check. The judgment reviewed had been in favor of both the defendants. The question of the liability of an indorser on a draft, generally, was discussed in the opinion and was embodied in the syllabus of the cause, yet the question of the liability of this defendant on its restricted indorsement was neither referred to in the syllabus nor in the opinion, and it will not do to say that this question might have been determined on this former hearing, for

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unless it was specifically determined it will not fall within the rule of the "law of the case."

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK, C., concurs.

POUND, C., concurring.

I concur in recommending that the judgment be affirmed. The rule appears to be well settled that a decision of this court constitutes the law of the case as to matters presented by the record and necessarily involved, whether expressly referred to in the opinion or not. *Home Fire Ins. Co. v. Johansen*, 59 Neb., 349, 353, and cases cited. But as stated by SULLIVAN, J., in the Johansen case, this means only that such matter "ordinarily will not be made the subject of re-examination." The case at bar comes within the exception. It is not an ordinary case where review of a question already sufficiently considered is asked for. There can be no question that defendant, the United States National Bank, is not legally liable, and a mere rule of expediency, meant to expedite judicial proceedings, ought not to be pressed so far as to require this court to do violence to law and justice by reason of misconception of facts or inadvertence in prior appellate proceedings. As Bleckley, C. J., said in a similar connection, at such times the maxim should be, not *stare decisis*, but *fiat justitia ruat cælum*. *Ellison v. Georgia Railroad Co.*, 87 Ga., 691.

AFFIRMED.

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CONCORDIA LOAN & TRUST COMPANY, APPELLANT, v. HANS  
SCHOUBOE ET AL., APPELLEES.

FILED DECEMBER 4, 1901. No. 10,086.

Commissioner's opinion. Department No. 1.

APPEAL from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed*.

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*H. W. Pennock and A. B. Coffroth*, for appellant.

*V. O. Strickler*, contra.

KIRKPATRICK, C.

The questions presented for determination in this case are identical with the question already determined in the case of *Concordia Loan & Trust Company v. Parrote*, 62 Neb., 629; and upon the authority of that case, the judgment herein should be affirmed. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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FRANKLIN E. REED V. MICHAEL R. BURG.

FILED DECEMBER 4, 1901. No. 10,314.

Commissioner's opinion. Department No. 2.

**Insolvent Corporation: ACTION FOR UNPAID SUBSCRIPTION TO STOCK:**  
How BROUGHT. In this state an action at law can not be maintained by a creditor of an insolvent corporation against a stockholder in such corporation for his unpaid subscription; such action can only be maintained by a bill in equity for the benefit of all the creditors of such corporation and against all the stockholders thereof whose subscriptions are unpaid.

ERROR from the district court for Pawnee county. Tried below before STULL, J. *Affirmed.*

*Story & Story and Paul Merrill*, for plaintiff in error.

The liability sought to be enforced by the plaintiff against the defendant as a stockholder in a Kansas corporation may be collected through the courts of states other than that of the domicile of the corporation. *St. Louis Railway Supplies Co. v. Harbine*, 2 Mo. App., 134; *Hodgson v. Cheever*, 8 Mo. App., 318; *Flash v. Conn*, 109 U. S., 371; *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass., 341; *Ferguson v. Sherman*, 116 Cal., 169; *Hoyt v. Bunker*,

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50 Kan., 574; *Bagley v. Tyler*, 43 Mo. App., 195; *Bell v. Farwell*, 176 Ill., 489; *Hancock National Bank v. Ellis*, 166 Mass., 414; *Whitman v. National Bank of Oxford*, 83 Fed. Rep., 288; *Kisseberth v. Prescott*, 91 Fed. Rep., 611; *Mechanics Savings Bank v. Fidelity Insurance, T. & S. D. Co.*, 87 Fed. Rep., 113; *Howell v. Manglesdorf*, 33 Kan., 194; *Western National Bank of New York v. Lawrence*, 76 N. W. Rep. [Mich.], 105; *Commonwealth Mutual Fire Insurance Co. v. Hayden*, 60 Neb., 636, 85 N. W. Rep., 443; *Rhodes v. United States National Bank*, 24 U. S. App., 607; *Dexter v. Edmands*, 89 Fed. Rep., 467; *Flash v. Conn*, 109 U. S., 371; *Aldrich v. Anchor Coal Co.*, 24 Ore., 32; *Dennick v. Railroad Co.*, 103 U. S., 18; *Paine v. Stewart*, 33 Conn., 516; *Cook, Stock and Stockholders* [2d ed.], page 242, section 223, and note 1, page 243; *Boone, Corporations*, section 126, page 179; 3 *Thompson, Corporations*, sections 3046, 3063; 2 *Morawetz, Private Corporations* [2d ed.], sections 870, 875; *Cuykendall v. Miles*, 10 Fed. Rep., 342; *McVickar v. Jones*, 70 Fed. Rep., 754; *First National Bank of Deadwood v. Gustin, M. C. M. Co.*, 42 Minn., 327; *Morris v. Glenn*, 87 Ala., 628; *Huntington v. Attrill*, 146 U. S., 657.

The contract made by the defendant in error with the plaintiff in error must be construed according to the statutes and decisions of the state of Kansas. *Hancock National Bank v. Ellis*, 166 Mass., at page 418; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass., 349, 353; *Halsey v. McLean*, 12 Allen [Mass.], 438, 441; *Flash v. Conn*, 109 U. S., 371; *Bell v. Farwell*, 176 Ill., 489; *Rhodes v. United States National Bank*, 24 U. S. App., 607; *Whitman v. National Bank of Oxford*, 83 Fed. Rep., 288; *Mechanics Savings Bank v. Fidelity Insurance T. & S. D. Co.*, 87 Fed. Rep., 113; 3 *Thompson, Corporations*, sections 3046, 3063; *Howell v. Manglesdorf*, 33 Kan., 194; *Western National Bank of New York v. Lawrence*, 76 N. W. Rep. [Mich.], 105; *Dexter v. Edmands*, 89 Fed. Rep., 467; *Guerney v. Moore*, 131 Mo., at page 672; *Whitman v. National Bank of Oxford*, 83 Fed. Rep., 288.

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It is not necessary to make all the stockholders of the corporation parties defendant. *Abbey v. Dry Goods Co.*, 44 Kan., at page 418; *Bell v. Farwell*, 176 Ill., 489; *Mechanics Savings Bank v. Fidelity Insurance T. & S. D. Co.*, 87 Fed. Rep., 113; *Whitman v. National Bank of Oxford*, 83 Fed. Rep., 288; *Paine v. Stewart*, 33 Conn., 516; *Hancock National Bank v. Ellis*, 166 Mass., at page 418; 3 Thompson, Stockholders, sections 3086, 3087, 3088, 3500, 3502.

*Lindsay & Raper, contra.*

OLDHAM, C.

This was an action at law instituted by the plaintiff in error against the defendant in error in the district court for Pawnee county, Nebraska, for the purpose of recovering from the defendant the amount of his stock and his unpaid subscriptions for stock in the Blaine Gasoline Engine & Thresher Company, a Kansas corporation.

The petition states that the Blaine Gasoline Engine & Thresher Company, a Kansas corporation, was organized in November, 1895; that the defendant, Michael R. Burg, subscribed for and became the owner of five shares of stock in said company of the par value of \$100 each; that he paid thereon the sum of \$100, and that he is still the owner of the said five shares. It also alleges that the total amount of stock in said company was \$150,000. It alleges that on February 25, 1896, plaintiff recovered a judgment against the Blaine Gasoline Engine & Thresher Company in the court of common pleas of Wyandotte county, Kansas, on a note and account for the sum of \$843.15 with interest and costs in a case then pending in the court of common pleas of Wyandotte county, Kansas, wherein the plaintiff, Franklin E. Reed, was plaintiff and the Blaine Gasoline Engine & Thresher Company was defendant. A certified copy of this judgment is attached to the pleading and made a part thereof. The petition further alleges that an execution was returned unsatisfied on said judgment

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and that the corporation has no property or assets of any kind from which plaintiff's debt can be satisfied except the several amounts remaining unpaid from the stock subscribed, and that the directors have not and will not make an assessment on the unpaid stock for the satisfaction of plaintiff's debt. The petition then sets out the provisions of chapter 23, section 32, article 4, of the statutes of Kansas (1868), as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

To this petition defendant filed a demurrer for the following reasons to-wit: "First. This court has no jurisdiction over the subject of the plaintiff's alleged cause of action, for that the statutory liability of stockholders in a foreign corporation cannot be enforced except at the domicile of the corporation, when the law of the domicile provides the remedy. Second. There is a defect of parties defendant, in that all the stockholders of the Blaine Gasoline & Theshing Company are not made defendants. Third. The petition does not state facts sufficient to constitute a cause of action against this defendant." This demurrer was sustained by the court below, and plaintiff refusing to further plead his petition was dismissed and he now brings error to this court.

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In examining this petition we are confronted with the proposition that there is no allegation or attempted allegation of the jurisdiction of the "court of common pleas of Wyandotte county, Kansas," either over the person of the defendant or the subject-matter of the action on which its alleged judgment was rendered. The transcript of judgment attached to the petition does not pretend to recite any service on or appearance of the defendant; and if this lack of allegation of jurisdiction of either the subject-matter or the parties to the judgment is upheld it can only be done by this court taking judicial notice of the general jurisdiction of the court of common pleas of Wyandotte county, Kansas, and supplying the want of allegations in plaintiff's petition by a presumption of the regularity of the judgment of that court.

The question then is, is the court of common pleas of Wyandotte county, Kansas, a court of whose general jurisdiction we should take judicial notice? This question should be examined by the light of the decisions of our own court as well as the decisions of the neighboring states and the opinions of text writers. The question was before this court in the case of *Tessier v. Englehart & Co.*, 18 Neb., 167. There the question was raised by the answer of the defendant, who pleaded as one of his defenses a judgment of the superior court of Cook county, Illinois, without alleging the jurisdiction of that court. COBB, C. J., in rendering the opinion said: "This defense was demurrable in not alleging either that the superior court of Cook county, Illinois, is a court of general jurisdiction, or that it had jurisdiction of the subject-matter of said judgment, or of the person of said defendant. Said court being a foreign tribunal, in the sense of the law and authorities, such allegation was necessary, and its absence could be taken advantage of either by demurrer or by objection to the introduction of testimony under that paragraph of the answer, and perhaps in other ways." The question was again before this court in *Specklemeyer v. Dailey*, 23 Neb., 101. In this case the judgment pleaded



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was of the circuit court of Boone county, Indiana, and no jurisdiction was alleged. REESE, C. J., in the opinion, referring to *Tessier v. Englehart*, *supra*, says: "We have no doubt of the correctness of that decision, but do not deem it authority in this case. There is nothing in the title of the court referred to which by its terms would indicate that it is a court of general jurisdiction, and therefore it was necessary that the facts conferring such jurisdiction should be pleaded. But in the case at bar the allegation that the judgment was rendered by the Boone county circuit court, in the state of Indiana, was a sufficient allegation that the court rendering the judgment was a court of general jurisdiction." The opinion in this case is grounded on the authority of *Jarvis v. Robinson*, 21 Wis., 523, which says that where the title "clearly indicates a court of general jurisdiction, it must be so understood"; and also on the authority of *Shotwell v. Harrison*, 22 Mich., 410, and *Butcher v. Bank*, 2 Kan., 70. In each of these latter cases the doctrine of recognition was founded on the fact that the courts recognized had general jurisdiction conferred upon them by the constitutions of their respective states and that we should take judicial notice of the constitution of a sister state. 2 Black, Judgments, section 875, says: "And it is further to be observed that if the court rendering the judgment was one of limited, inferior, or statutory jurisdiction, or if the proceedings were in derogation of the common law, jurisdiction will not be presumed, but must be affirmatively shown by the face of the record or fully and distinctly pleaded and proved." In the case at bar it is conceded that the court of common pleas of Wyandotte county, Kansas, is a court constituted by legislative enactment and is not a court whose general jurisdiction is conferred by the constitution of the state of Kansas.

In *Commonwealth v. Blood*, 97 Mass., 538, the supreme court of that state refused to recognize a decree of divorce granted by the district court of the fourth judicial district of California in the absence of an allegation show-



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ing that that court had jurisdiction over the subject of divorce, saying, "its jurisdiction over the subject of divorce is a special authority not recognized by the common law, and its proceedings in relation to it stand on the same footing with those of courts of limited and inferior jurisdiction." Of similar import have been the holdings in *Gay v. Lloyd*, 1 G. Green [Ia.], 78, 46 Am. Dec., 499; *Gunn v. Howell*, 27 Ala., 663, 62 Am. Dec., 785; *Pelton v. Platner*, 13 Ohio, 209.

While it is true that most of the states take judicial notice of the constitutions of sister states, and because of this fact take notice of the general jurisdiction conferred by the constitutions on the courts of the several states, yet it is also true that the courts of one state will not take judicial notice of the statutes of another state; and it therefore follows that when a judgment of a court of a foreign state is alleged upon, and such court is one which has no general jurisdiction conferred upon it by the constitution of such state its jurisdiction should be specifically alleged. It follows from the above course of reasoning that the petition in the case at bar falls within the rule announced in *Tessier v. Englehart*, *supra*, and not within the rule in *Specklemeyer v. Dailey*, *supra*, and it is fatally defective unless it states a good cause of action under our own laws.

This action could not be maintained under the laws of the state of Nebraska, because by a well defined line of decisions this court has held that the unpaid subscriptions of stockholders of an insolvent corporation is a trust fund for the benefit of all the creditors of the corporation and that one creditor cannot maintain an action at law against a stockholder in an insolvent corporation for his unpaid subscription, but that such action can only be maintained by a bill in equity for the benefit of all the creditors of the corporation and against all the stockholders of such insolvent corporation whose subscriptions are unpaid. *Farmers Loan & Trust Co. v. Funk*, 49 Neb., 353; *German National Bank v. Farmers & Merchants Bank*, 54 Neb.,

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593; *Van Pelt v. Gardner*, 54 Neb., 701; *Hastings v. Barnd*, 55 Neb., 93; *Pickering v. Hastings*, 56 Neb., 201.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

NOTE.—While the above opinion is largely devoted to a discussion of the point as to whether or not the courts of this state will take judicial notice that the court rendering the judgment in Kansas is, or is not, one of general jurisdiction, and the decision is reached that they will not, and that the petition should have alleged the fact, yet the decision seems to be rightly placed on the point given in the syllabus as this rule disposes of the principle involved in the case and is not based upon a technical objection.—REPORTER.

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### CONCORDIA LOAN & TRUST COMPANY V. DOUGLAS COUNTY.

FILED DECEMBER 4, 1901. No. 10,328.

Commissioner's opinion. Department No. 3.

1. **Taxation: CAVEAT EMPTOR.** The rule of *caveat emptor* applies to the purchaser of real estate at a tax sale.
2. **Certifying City Assessments: MISTAKE: LIABILITY OF COUNTY.** A county is not liable, under section 131, article 1, chapter 77, Compiled Statutes, for a mistake of a city officer in certifying city assessments to the county treasurer.
3. **Tax Sale: LARGER TRACT SOLD THAN COVERED BY LEVY: DESCRIPTION: EFFECT.** Where an entire tract of land is sold at private tax sale for special city assessments levied against only a portion thereof, and a tax receipt is issued in pursuance of such sale, in which the entire tract is described, such sale can not be said to have been made "in consequence of error in describing such land in the tax receipt," within the meaning of said section.

ERROR from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*Henry W. Pennock*, for plaintiff in error.

*Geo. W. Shields*, contra.

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**ALBERT, C.**

On the 7th day of January, 1892, E. B. Baer, at private tax sale, bought certain real estate in Douglas county. The tax, for which the sale was made, was a grading assessment of the city of Omaha, levied on only a portion of the land so bought. The sale of the whole tract, for the tax levied on only a portion of it, was not due to any mistake of the county treasurer, but the city officer who certified the city taxes to him. Afterward, the purchaser paid subsequent taxes on the property, including city and county taxes; and, on December 14th, following, assigned his tax certificate, and his rights thereunder, to the Concordia Loan & Trust Co., the plaintiff in this case. The plaintiff thereafter paid subsequent taxes on the land, including both regular and special assessments. Afterward, in an action brought in the district court of Douglas county, it was duly adjudged that such tax certificate was a lien *pro rata* on that portion of the land against which the assessment was levied, and not a lien on the remainder. The plaintiff then filed its claim before the county board of Douglas county, for all that part of the taxes paid by reason of the mistake in selling the entire tract when only a portion thereof was subject to sale. The board rejected the claim. On appeal, the district court found against the plaintiff as to all city taxes, but in its favor for other taxes paid subsequent to the sale, and rendered judgment accordingly. The plaintiff brings the case here on appeal.

The plaintiff contends that it was entitled to a judgment for the taxes levied by the city, in addition to what was awarded it by the court. Aside from one question, which we shall notice presently, we think this contention is fully disposed of in *Martin v. Kearney County*, 62 Neb., 538, 87 N. W. Rep., 351, decided by this court, September 18, 1901, in which it is held, that the rule of *caveat emptor* applies to the purchaser of real estate at tax sale. In the body of the opinion, HOLCOMB, J., says: "The levy was certified to the proper county officers, and in the perform-

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ance of a ministerial duty imposed on them the taxes levied were entered on the tax record against all the property lying in the corporate limits of the city making the levy. The taxes were collected and turned over to the city authorities entitled thereto. There was no mistake or wrongful act on the part of the county treasurer or other county officers. \* \* \* The county acted only for the purpose of collecting the levy made by the city and turning over the funds to the municipality. Further than this, it and its officers had no interest in the matter, and no greater responsibility should have been or was by the legislature intended to attach to them than necessary to a proper discharge of their duty incident to such collection. The taxes held illegal were not levied by or for the benefit of the county, and we observe no sound reason for holding the county to any further or greater responsibility." As we have seen, the mistake in this case was not that of any county officer but of one of the officers of the city; hence the foregoing is clearly applicable and fully accords with our views.

But the plaintiff insists that the entire tract was sold in consequence of an error in describing the land in the tax receipt issued to the purchaser in pursuance of his purchase at the tax sale; and for that reason his case falls within the provisions of section 131 of the revenue act, which provides, among other things, as follows: "Whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless." We are not required to construe that portion of the section quoted, because, in our opinion, it has no application to this case. Section 113, of the same act, provides: "After a tax sale shall have closed, \* \* \* if any real estate remain unsold for the want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office, to any person who will pay the amount of taxes, penalty, and costs thereof for the same, and make out duplicate receipts for the taxes on such real estate, and deliver one

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to the purchaser and the other to the county clerk." The sale and the payment of the purchase price precede the receipt. Whatever else may be in doubt, this much is clear; consequences can never precede, in point of time, the source from which they flow. It follows that it cannot be successfully urged, that the sale to the plaintiff was "in consequence of error in describing such land in the tax receipt," made in pursuance of such sale.

In our opinion, the judgment of the district court is right, and we recommend that it be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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ELLEN T. MUCHMORE V. JAMES A. GUEST.

FILED DECEMBER 4, 1901. No. 10,528.

Commissioner's opinion. Department No. 2.

**Process: No SERVICE AND IRREGULAR SERVICE DISTINGUISHED.** There is a well-marked distinction maintained between judgments rendered in which there has been no service of summons at all and those rendered where there has been service of summons irregularly made. In the former class the judgment may be collaterally impeached, but in the latter the defect is waived, unless directly assailed.

**ERROR** from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

*F. N. Prout*, for plaintiff in error.

*A. H. Babcock*, contra.

OLDHAM, C.

This was an action in ejectment in the district court for Gage county, Nebraska, instituted by the plaintiff below for the recovery of the possession of certain lots situated in the village of Liberty, Gage county, Nebraska. A jury was waived and trial was had to the court and judgment

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was rendered for the plaintiff and defendant brings error to this court.

It is conceded that the common source of title from which each of the litigants claim is F. M. Muchmore, who is conceded to have been the owner of the premises in dispute at and prior to the 27th day of August, 1885. Plaintiff claims title under a sheriff's deed dated March 3, 1888, executed under an order of sale issued by the district court for Gage county, Nebraska, on a judgment entered in said court on the 16th day of November, 1887. This judgment was rendered by the district court on an action prosecuted by plaintiff, James A. Guest, against F. M. Muchmore and defendant, Ellen T. Muchmore, and John S. Muchmore, Jr. The action was in the nature of a creditors' bill and sought to charge the lands in dispute with the payment of a judgment which the plaintiff, James A. Guest, had procured against F. M. Muchmore and W. F. Richards in the district court for Gage county, and to cancel a deed to the premises in dispute executed by F. M. Muchmore and defendant, Ellen T. Muchmore, and delivered to John S. Muchmore, Jr., on the 27th day of August, 1885. Defendant claims title under a quitclaim deed executed and delivered to her by John S. Muchmore, Jr., on the 1st day of December, 1896.

It appears from the testimony in the record that after the delivery of the sheriff's deed to plaintiff, in 1888, he entered into the possession of the premises in dispute and occupied them continuously, by his tenants, until sometime in the year 1896, when, during a temporary vacancy of the premises the defendant took possession and subsequently procured the quitclaim deed on which she now asserts title. Her contention is that the judgment of the district court in favor of the plaintiff and against F. M. Muchmore and W. H. Richards was void, because F. M. Muchmore was improperly served with process in that cause of action. While we do not think this objection is material, in view of the conclusion we shall reach on an examination of the record and judgment in the creditors'

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bill proceeding, yet, as this objection is strongly urged by counsel for defendant in an able brief we shall examine it briefly.

It appears from the record that in the cause of action, on which the judgment at law was rendered against F. M. Muchmore and W. H. Richards, the first summons issued was returned by the sheriff of Gage county, Nebraska, with service on W. H. Richards but without having found F. M. Muchmore within the county. It also appears from the record that an *alias* summons was issued to the sheriff of Gage county, Nebraska, against F. M. Muchmore. This summons was in proper form and bore the following return: "Received April 27, 1886. As commanded by the writ I summoned the witness named April 27, 1886, F. M. Muchmore, by delivering to him a certified copy. Wm. Montgomery, Guide Park precinct, Constable." F. M. Muchmore did not appear in this cause of action and judgment was rendered against him on the 27th day of September, 1886, for the sum of \$614.06 and costs. While the return to this summons was informal and might have been successfully attacked by special appearance, before judgment, yet in absence of a clear showing that no service of the summons was had at all on F. M. Muchmore, the judgment rendered on such irregular service cannot be collaterally impeached. There is a well marked distinction maintained by the decisions of our own court between judgments rendered where there has been no service of summons at all and those rendered where there has been service irregularly made. In the former class the judgment may be impeached by collateral attack, but in the latter the defect is waived, unless assailed in a direct proceeding before judgment. *Gilbert v. Brown*, 9 Neb., 90; *Seward v. Didier*, 16 Neb., 58; *Holliday v. Brown*, 33 Neb., 657; *Gandy v. Jolly*, 35 Neb., 711; *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb., 283.

An attack is made on the judgment in the creditors' bill proceeding for the alleged reason that there was no proper service of summons in this case on John S. Muchmore.

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This judgment was by default and the court found, among other things, that "due personal notice of the filing and pendency of this petition was given to the defendants according to law." This finding of the court is attempted to be impeached by the return of the summons, as to the service on John S. Muchmore. The summons bore the following indorsements:

"Summons.

District court.

Doc. H. No. 2254. Page 191.

JAMES A. GUEST,  
*Plaintiff,*

*Against*

F. M. MUCHMORE ET AL.,  
*Defendants.*

I hereby deputize L. J. Palmer to serve this within writ.

E. F. DAVIS,  
Sheriff.

A. V. S. SAUNDERS,  
Clerk D. C.

Filed May 26, 1887.

By E. E. WORRALL,  
Depy.

State of Nebraska, }  
Gage County } ss.

Received this writ on the 20th day of May, A. D., 1887, and on the 22nd day of May A. D., 1887, I served the within summons on the within named John S. Muchmore by delivering to and leaving with the said John S. Muchmore a true and certified copy of this writ, together with all the indorsements thereon. All done in Gage County, Nebraska.

Witness my hand this 22nd day of May, 1887.

Fees.

Service	\$ .50	Sheriff.
Copy	.25	
Mileage	2.60	
Total	3.35	L. J. PALMER, Deputy."

The only objection urged against the return of this service is the fact that the return was not verified by L. J.



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Palmer. This objection, however, is one of a mere irregularity in the return which could have been raised in a direct attack but is not available in a collateral action. *Larimer v. Wallace*, 36 Neb., 444. These are all the contentions on which defendant relies for a reversal of this cause.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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ROBERT B. MORTON ET AL. V. THE WESTERN SEED & IRRIGATION COMPANY.

FILED DECEMBER 4, 1901. No. 10,538.

Commissioner's opinion, Department No. 2.

**Judgment:** SUPERSEDEAS: NECESSITY FOR TRANSCRIPT. In order to supersede a judgment under sections 588 and 590, Code of Civil Procedure, a transcript as well as a petition in error must be filed in the supreme court.

ERROR from the district court for Douglas county.  
Tried below before DICKINSON, J. *Reversed.*

*Byron G. Burbank*, for plaintiffs in error.

*Joel W. West*, contra.

POUND, C.

The controlling question in this cause is whether at the time of the sheriff's sale which is the basis of plaintiff's complaint the judgment under which the sale was held had been superseded. The plaintiff alleged that prior to the sale it had "filed a petition in error together with a transcript of the final judgment \* \* \* in the supreme court," and that a supersedeas bond was thereupon duly executed, filed and approved. At the trial plaintiff introduced the

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supersedeas bond, a certified copy of the petition in error filed in the supreme court, a summons in error with return showing service thereof, and a certificate of the clerk of the supreme court that a petition in error was on file. There was no certificate or proof of any sort that a transcript had been filed unless the filing thereof may be presumed from the issuance of summons in error. But whatever presumption might thus arise is overcome by the clerk's certificate, which raises a strong inference that only a petition in error was on file, confirmed also by the recitals of the undertaking and several notices served upon the sheriff by plaintiff, all of which recite the filing of a petition in error only though the form of undertaking in common use recites filing of a transcript. Even the petition in error omits the usual statement that a transcript is filed therewith. Plaintiff alleged the filing of both transcript and petition in error, but we think it proved only the filing of the latter. Construing sections 588 and 590, Code of Civil Procedure, in connection with section 586, we are satisfied that in order to supersede a judgment under the two former sections a transcript as well as a petition in error must be filed in the supreme court. Originally the Code merely required an undertaking. But in 1873 section 590 was amended to provide that before the undertaking mentioned in section 588 should operate as a supersedeas "a petition in error must be filed in the appellate court." The obvious purpose of this change was to require the judgment debtor to actually institute his error proceedings as well as give an undertaking before the judgment creditor could be deprived of his right to enforce the judgment. A petition in error without a transcript is wholly nugatory. It gives the supreme court no jurisdiction, and has no legal effect whatever. *Garneau v. Omaha Printing Co.*, 42 Neb., 847. By requiring a petition in error to be filed, the legislature meant to require it to be filed as provided by section 586 just preceding. A proceeding of some legal force and validity was contemplated, not a mere pretense conferring no power

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or jurisdiction on the court wherein it was begun. The same view was taken of statutory provisions of like import in *Glafcke v. O'Brien*, 1 Wyo., 316, and such has been the general understanding of the profession. Strawn, Supreme Court Practice, 162.

We recommend that the judgment be reversed and the cause remanded.

SEDGWICK and OLDHAM, CC., concur.

REVERSED AND REMANDED.

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S. H. H. CLARK ET AL. V. COLFAX COUNTY.

FILED DECEMBER 4, 1901. No. 10,556.

Commissioner's opinion. Department No. 3.

1. **Tender:** OBJECTED TO ON CERTAIN GROUNDS WAIVES OTHERS. Where a tender is accompanied by a condition, and the party to whom the tender is made makes no objection to such condition, but rejects the tender on the sole ground that the amount tendered is insufficient, the condition does not vitiate the tender.
2. **Taxes:** LEVIED IN EXCESS OF LEGAL LIMIT: REMEDY: TENDER. Where a tax is levied in excess of the legal limit, a taxpayer is not restricted to the statutory remedy but may tender the amount assessed against him less such excess.
3. **Tender Kept Good:** INTEREST. If such tender is rejected, and is kept good by the party making it, in an action for the recovery of such taxes, no recovery can be had for interest accruing after such tender.

ERROR from the district court for Colfax county. Tried below before MARSHALL, J. *Reversed.*

*W. R. Kelly* and *E. P. Smith*, for plaintiffs in error.

*Geo. H. Thomas* and *J. A. Grimison*, contra.

ALBERT, C.

This action was brought by Colfax county, against the receivers of the Union Pacific Railway Company, for taxes levied against the company for the year 1896. The de-

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fendant pleaded a tender of the amount due. As to such plea, the plaintiff replied by impliedly admitting that the amount, alleged to have been tendered, was tendered by the defendants, and alleging that such tender was accompanied by conditions upon which the defendants had no right to insist, and was therefore ineffectual. During the pendency of the action, the trial court made an order permitting the plaintiff to accept the amount of the tender, which had been paid into court, without prejudice to its rights in this case, in pursuance of which order it was paid to the plaintiff. A trial was had to the court, which resulted in a finding and judgment for the plaintiff for interest on the amount tendered from the date of the alleged tender to the date of the receipt of the money by the plaintiff in pursuance of the order hereinbefore mentioned. There is a specific finding, "that the tender claimed and shown by the defendants was and is conditional, and therefore invalid as a tender." The defendants bring the case here on error.

From the specific finding above mentioned, taken in connection with the fact that plaintiff's recovery was limited to interest on the amount tendered, it is clear that the decision of the trial court is based wholly on the ground that the tender was not absolute, but conditional. At the time of the tender there was a dispute between the parties as to the amount legally due for taxes for the year 1896. This dispute grew out of a levy of twenty mills school district tax, for a certain school district, and a levy of eleven mills school district bond tax for the same district. The defendants claimed that the total school tax for that district was eleven mills in excess of the limit fixed by section 24, subdivision 14, chapter 79 of the Compiled Statutes of 1895, in force at that time, and applicable to said district, which provides "that the aggregate school tax shall in no one year exceed two per cent." The tender covered all the taxes due, save such school tax, so far as the same was in excess of two per cent. The county treasurer refused to accept the tender, and based his refusal on

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the sole ground that the amount tendered was less than the amount specified on the tax list. The rule appears to be, that where a tender is accompanied by a condition on which the party making the tender has no right to insist, and no objection is made to the condition, but the tender is refused on the sole ground that the amount tendered is insufficient, the accompanying condition does not vitiate the tender. *Moynahan v. Moore*, 77 Am. Dec. [Mich.], 468; *Graham v. Frazier*, 49 Neb., 90. Applying that rule, the tender of the defendants having been found sufficient in amount to the trial court, was effectual, notwithstanding the condition accompanying it. But it is argued, on behalf of the plaintiff, that the defendants have mistaken their remedy; that they should have availed themselves of the provisions of section 144, article 1, chapter 77 of the Compiled Statutes. Where taxes are levied in excess of the amount authorized by law, to the extent of such excess they are levied for an illegal and unauthorized purpose. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb., 393. As to such excess, the levy is void. A void tax is no tax. That being true, the defendants occupy precisely the same position, so far as their rights in this case are concerned, that they would have occupied had there been no excessive levy and they had tendered the full amount of the tax levied against them, and the treasurer had arbitrarily demanded a larger amount. Will it be claimed that, under such circumstances, the defendants would be required to pay the excess arbitrarily demanded and then pursue the circuitous statutory course to recover the excess? We think not; and to us it is equally clear that they were not required to pursue that course in this case.

It follows that the judgment of the district court should be reversed, and the cause remanded for a new trial, and we so recommend.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

First Nat. Bank of Albion v. Snyder.

FIRST NATIONAL BANK OF ALBION, NEBRASKA, v. CORA SNYDER.

FILED DECEMBER 4, 1901. No. 10,579.

Commissioner's opinion. Department No. 1.

**Partition Sale: PROCEEDS: EXEMPTION.** Proceeds of a partition sale of real estate cannot be claimed as exempt personal property against one who had and has taken proper steps in the partition proceedings to enforce a judgment lien against the land partitioned.

**ERROR** from the district court for Boone county. Tried below before KENDALL, J. *Reversed with directions.*

*H. C. Vail*, for plaintiff in error.

*M. W. McGan* and *J. S. Armstrong*, *contra*, but filed no brief.

HASTINGS, C.

In a partition the plaintiff, bank, claimed a lien upon the share of John F. Snyder for \$385 debt, and costs of \$25.48, upon a judgment recovered in 1893 against said Snyder. The father, Peter Snyder, died December 6, 1896, seized in fee of two hundred and five acres of land in Boone county, where the judgment against the son was on the judgment docket, unreversed, unpaid and in force. After the decree of distribution, which it was found impossible to carry out, the real estate was sold, and it was found that there was due from it, as John F. Snyder's share, \$277.63. In the meanwhile his wife, Cora Snyder, had filed a plea of intervention, setting up the absence of her husband from the state; that she was the head of a family; that she had neither lands, town lots nor houses subject to exemption as a homestead, and claiming this money as a personal exemption. Her claim was allowed by the trial court, and the money found to be exempt from plaintiff's claim, and was decreed to be paid to the wife. From this decree the plaintiff, bank, appeals.

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The bank's claim is, in substance, that this real estate descended to the heirs of Peter Snyder, one of whom was John F.; that when it so descended the judgment on the records of Boone county attached to John F. Snyder's interest and became and remained a lien upon it, and when the land was sold in the partition proceedings, the proceeds, so far as they went to John F. Snyder, should have been paid in discharge of this lien. Section 805, Code of Civil Procedure. No brief has been filed by the defendant in error, and it is impossible to see on what principle the action of the trial court can be sustained. The title to this portion of the estate certainly passed to John F. Snyder on the father's death. The property was not a homestead, and clearly was not exempt from seizure for John Snyder's debts. It certainly became subject to the lien of this judgment, and as certainly the partition proceedings did not serve in any manner to discharge that lien. The sale in the partition proceedings to which the plaintiff was a party, must be held to have been made to enforce plaintiff's lien. The proceeds are no more subject to any claim of exemption as personalty than if they were the proceeds of an execution sale and in the hands of the court by that means. Section 805, Code.

It is therefore recommended that the decree of the trial court, so far as it provides for the payment of this money to Cora Snyder, be reversed and the cause remanded with instructions to enter a decree in favor of plaintiff.

' DAY and KIRKPATRICK, CC., concur.

The decree of the trial court, so far as it provides for the payment of this money to Cora Snyder, is reversed, and the cause remanded with instructions to the district court to enter a decree in favor of the plaintiff.

**REVERSED AND REMANDED.**

Schulz v. Modisett.

## JAMES SCHULZ ET AL. V. A. M. MODISETT ET AL.

FILED DECEMBER 4, 1901. No. 10,582.

Commissioner's opinion. Department No. 2.

- 1 **Witnesses:** **HYPOTHETICAL QUESTIONS:** WHAT THEY SHOULD EMBRACE. All the undisputed pertinent facts of a case should be substantially included in hypothetical questions propounded to expert witnesses.
2. **Appeal and Error:** **EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to sustain the judgment.

ERROR from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*Good & Slama*, for plaintiffs in error.

Hypothetical questions must not assume the existence of facts of which no evidence is offered. An hypothetical question must be based on all the facts proven in the case. *Sauntman v. Maxwell*, 54 N. E. Rep. [Ind.], 397; *Vermillion Artesian Well Co. v. City of Vermillion*, 61 N. W. Rep. [S. Dak.], 802; *Central R. & B. Co. v. Maltsby*, 16 S. E. Rep. [Ga.], 953; *Hall v. Rankin*, 54 N. W. Rep. [Ia.], 217; *Prather v. McClelland*, 26 S. W. Rep. [Tex.], 657; *Vosburg v. Putney*, 50 N. W. Rep. [Wis.], 403; *Kelly v. Perrault*, 48 Pac. Rep. [Idaho], 45; *Bergen County Traction Co. v. Bliss*, 41 Atl. Rep. [N. J.], 837; *Galveston H. & S. R. Co. v. Pitts*, 42 S. W. Rep. [Tex.], 255; *Culbertson v. Metropolitan St. R. Co.*, 36 S. W. Rep. [Mo.], 834; *Connell v. McNett*, 67 N. W. Rep. [Mich.], 344; *Turner v. Township of Ridgway*, 63 N. W. Rep. [Mich.], 406; *Schaidler v. Chicago & N. W. R. Co.*, 78 N. W. Rep. [Wis.], 732.

*George E. Pritchett*, contra.

OLDHAM, C.

This is a suit against the maker and indorser on a promissory note for the balance due thereon of \$3,338.05.



## Schulz v. Modisett.

Defendants admitted the execution of the note, but alleged, as a defense, that the note was given as a part of the purchase price for five hundred and forty-five head of cattle bought from the plaintiff below by the defendants below, James and Hans Schulz, through the agency of the defendants, Rice Bros. & Nixon; that the cattle were purchased at the agreed price of \$3.15 per hundred weight after allowing three per cent. for shrinkage. They were weighed on the scales of plaintiffs below and when so weighed a part of the purchase price was paid in cash and a note of \$9,914 was given for the remainder of the purchase price. This is the note in controversy. They also allege that the scales on which the cattle were weighed were inaccurate and incorrect in the weight, and instead of the net weight of the cattle, after deducting three per cent. shrinkage, being 703,745 pounds as shown by plaintiffs' scales, the true net weight of said cattle was not to exceed 600,000; that they had not discovered the alleged fraud practiced upon them by the plaintiffs until a part of the purchase price had been paid and the note for the remainder, sued on, had been executed and delivered to plaintiffs. Plaintiffs replied denying these allegations of the answer. Trial was had to a jury; there was judgment for the plaintiffs for the full amount due on the note, and defendants bring error to this court.

There is no complaint made of any instruction given or refused by the trial court. The only complaint, to which our attention is directed, is as to the forms of questions propounded by counsel for the plaintiffs in the examination of his witnesses. But an examination of the very voluminous record in this cause shows that these criticisms are purely technical and without any substantial merit.

It is also contended that there was no proper foundation laid for the expert testimony introduced by plaintiffs tending to show the probable loss in the weight of the cattle in their shipment from Irvin to Wahoo. It is claimed that the hypothetical questions propounded to the wit-

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nesses did not contain a fair statement of the facts in regard to the cattle and their transportation as shown by the testimony of the preceding witnesses. It is true that all the undisputed pertinent facts of a case must be included in hypothetical questions. *Levinson v. Sands*, 81 Ill. App., 578. This is just what was done. But the defendants contend that everything which they claimed to be connected with that shipment should have been included in plaintiff's hypothetical questions. This is not the rule. They had a right to and did examine their own experts on their theory of the facts connected with that shipment, but they could not compel plaintiffs to submit their theory of facts, which were not admitted by plaintiffs, to plaintiffs' experts.

There was no dispute in the trial below that the note was given for a balance of the purchase price for five hundred and forty-five head of cattle. It was admitted that these cattle were weighed in the presence of defendants' agent on plaintiffs' scales, and that these scales showed that the cattle weighed 725,510 pounds and that after deducting three per cent. for shrinkage there were 703,745 pounds which were to be paid for at the agreed price of \$3.15 per hundred weight, which amounted to \$22,167.96. It is also admitted that \$12,253.96 of this amount was paid in cash and that \$9,914 was paid by note, and that \$7,000 had been paid on this note by the defendants about six months after the purchase of the cattle. It also appeared that there was no objection made by the defendants to the weight of the cattle at the time this payment was made. The character of the testimony by which the defendants sought to impeach the accuracy of the plaintiffs' scales was of a very dubious and unsatisfactory kind. It consisted largely of the judgment of cattle men who looked at the cattle after they had been shipped from Irvin in Sheridan county to Wahoo in Saunders county, Nebraska. As to the weight of the cattle, there was no testimony of any expert who had tested the scales that they were inaccurate, nor were the cattle weighed again on any other scales until they had

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been fattened and shipped to the markets in South Omaha and Chicago. Under this condition of the testimony we can scarcely see how the jury could have found other than it did on the issues submitted.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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JENNIE C. RUSSELL V. JOHN A. GUNN.

FILED DECEMBER 4, 1901. No. 10,612.

Commissioner's opinion. Department No. 1.

**Appeal and Error:** INSTRUCTION WITHDRAWING ISSUE. An instruction which substantially withdraws an issue in the case is erroneous.

ERROR from the district court for Red Willow county. Tried below before NORRIS, J. *Reversed.*

*Harlow W. Keyes and Doyle & Berge*, for plaintiff in error.

*W. R. Starr, contra.*

DAY, C.

John A. Gunn brought this action in the district court of Red Willow county against Jennie C. Russell to recover for medical services rendered by him pursuant to an alleged employment by the defendant. Upon the trial there was a verdict for the plaintiff upon which judgment was rendered, to review which the defendant has brought error to this court. The petition was in the usual form of an action to recover for services rendered under a contract of employment. The answer charged three defenses: 1. A qualified general denial; 2. Pleading of the statute of frauds, and 3. A plea of coverture.

One of the errors now complained of is that the court in its instructions to the jury failed to state the issues as presented by the pleadings and the evidence, in that

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the court wholly failed to mention the second and third defenses alleged in the answer. The only reference to the issues in the instructions appears in instruction number one given by the court, which was as follows:

"This is an action brought by the plaintiff against the defendant for professional services. Upon most of the points in the case there is practically no dispute in the evidence. Under the evidence there can be no question but that the plaintiff received the telegram that has been testified about in evidence; that acting in good faith and upon the strength of such telegram he performed the services for which the action is brought, and that the reasonable value of such services is what is claimed in this action.

"About the only thing for you to consider is whether or not the defendant authorized Dr. Demay to send for Dr. Gunn. If you find from the evidence that the defendant authorized or instructed Dr. Demay to send the telegram in question then your verdict should be for the plaintiff. If you find from the evidence that the defendant did not authorize or instruct Dr. Demay to send for Dr. Gunn then your verdict should be for the defendant."

As to the defense of the statute of frauds we think the court might with propriety have regarded it as mere surplusage. The action was clearly based upon an allegation of employment by the defendant; the fact that the service was rendered for the benefit of some one else would make it none the less the contract of the parties. The court instructed the jury that if the defendant did not authorize or instruct the employment of the plaintiff there could be no recovery. This instruction sufficiently covered the phase of the case presented by the statute of frauds and was as favorable to the defendant as she could ask.

The answer and the evidence also raised the defense of coverture, and this, we think, should have been submitted to the jury. The instructions of the court were too restrictive, in that they ignored one of the fundamental issues presented by the answer. Under the issues it was

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not sufficient, in order to find for the plaintiff, that the jury should be satisfied that the defendant employed the plaintiff to perform the service, they should have been instructed further, that defendant being a married woman, to bind herself by her contract, it must appear that the contract was entered into upon the faith and credit of her separate property and estate. The effect of the instruction given was to withdraw from the consideration of the jury an issue involved in the case. This was error. *Galloway v. Hicks*, 26 Neb., 531.

The defendant requested an instruction upon this phase of the case which we think was applicable to the issues and should have been given. In substance it charged that if the jury found that defendant made the contract alleged in the petition, then (she being a married woman) the jury should inquire whether she made such contract with reference to her separate property and business, or intended to bind her separate property for the payment thereof, and unless from the evidence the jury believed that the defendant made the contract of employment and that in making the same she made it with reference to her separate property and business or intended to bind her separate property for the payment thereof the defendant would not be liable. In this state the disability of a married woman to make a valid contract remains the same as at common law, except in so far as the disability has been removed by statute. *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb., 260. The statute has removed the common law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade or business or was made upon the faith and credit thereof and with intent on her part to bind her separate property. *Godfrey v. Megahan*, 38 Neb., 748.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

People's Building, Loan & Savings Ass'n v. Pickard.

THE PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION V.  
LIBBIE J. PICKARD ET AL.

FILED DECEMBER 4, 1901. No. 10,621.

Commissioner's opinion. Department No. 3.

**Usury:** PURCHASE OF EQUITY OF REDEMPTION. The defense of usury is of no avail to the purchaser of the equity of redemption, who has assumed and agreed to pay the mortgage debt.

ERROR from the district court for Adams county. Tried below before BEALL, J. *Reversed with directions.*

*A. H. Bowen*, for plaintiff in error.

*Smith & Olmstead*, contra.

DUFFIE, C.

This action was brought against John H. Walker and wife to foreclose a mortgage given by Libbie J. Pickard and Lorenzo F. Pickard to the plaintiff October 2, 1890, to secure the payment of \$400 and interest at the rate of ten per cent. per annum. The Pickards, previous to the commencement of the action, had sold and conveyed the mortgaged premises to the defendant, Walker, who as a part consideration of the purchase price assumed and agreed to pay the mortgage debt. While the Pickards were made parties to the action, they were not served with summons and no relief was asked against them. Walker alone made answer. The answer of Walker, while alleging payment of the mortgage, is clearly a plea of usury, and advantage is sought to be taken by him of what might perhaps be an usurious contract as between the original parties thereto. The district court found that the mortgage had been paid in full and gave a decree cancelling the same. We think the case is governed by the *Building & Loan Association of Dakota v. Walker*, 59 Neb., 456, and *Building & Loan Association of Dakota v. Bilan*, 59 Neb., 458; and following these cases, we

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recommend that the decree be reversed and the case remanded to the district court with direction to ascertain the amount due upon the mortgage according to its terms and enter a decree of foreclosure for said amount.

AMES and ALBERT, CC., concur.

The decree of the district court is reversed and the case remanded with direction to ascertain the amount due upon the mortgage according to its terms and enter a decree of foreclosure for said amount.

REVERSED WITH DIRECTIONS.

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ALBERT HARTSUFF, APPELLEE, v. RUDOLPH HUSS ET AL.,  
APPELLANTS, IMPLEADED WITH THE CITIZENS BANK  
OF OMAHA.

FILED DECEMBER 4, 1901. No. 10,625.

Commissioner's opinion. Department No. 3.

1. **Mortgages: CONFIRMATION: OBJECTIONS.** It is not a valid objection to the confirmation of a sale of real estate under a decree of foreclosure that such sale was made more than sixty days after the issuance of the order of sale. *Burkett v. Clark*, 46 Neb., 466, overruled, to the extent that it conflicts with the foregoing.
2. **Mortgages: CONFIRMATION OF SALE AT CHAMBERS: JURISDICTION.** A judge at chambers has jurisdiction to pass on all objections to the regularity of such sale, including objections to the appraisal, and in making the order of confirmation he impliedly overrules all such objections.
3. **Mortgages: DIRECTION OF CLERK TO MAKE ENTRY OF ORDER OF CONFIRMATION.** Where such order is entered on the records of the court and a party appeals therefrom, it will not be reversed on the ground that it does not affirmatively appear that the judge directed the clerk to make such entry.
4. **Writ of Assistance: JURISDICTION AT CHAMBERS.** A judge has no jurisdiction at chambers to grant a writ of assistance.

APPEAL from the district court for Douglas county.  
Tried below before POWELL, J. *Affirmed in part, reversed in part.*

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*Holmes & Morgan*, for appellants. .

*William D. Beckett* and *J. W. Woodrough*, contra.

ALBERT, C.

In an action brought by Albert Hartsuff against Rudolph Huss, and others, to foreclose a mortgage, a decree of foreclosure was entered, which provided that an order of sale issue for the sale of the mortgaged premises in satisfaction of the amount found due. An order of sale issued May 22, 1897; the land was appraised July 6, and the appraisal forthwith deposited with the clerk of the court; notice of sale was duly published, the first publication having been made July 14, and the sale had August 17 of the same year. On the 11th day of August preceding the sale, the appellant filed a motion to set aside the appraisement on the ground that it was not made immediately by the sheriff after receiving the order of sale, and, because it did not affirmatively appear that the appraisers were sworn to appraise the interest of Rudolph Huss in the property. On the 10th day of December, following, the appellant filed a motion to set aside the sale, and, in addition to the grounds urged in his motion to set aside the appraisement, urged that the property was appraised too low, that it did not appear that the appraisers were sworn before they entered upon their duties, and that the sale was made after the expiration of sixty days from the date of the order of sale. On the 20th of July, 1898, the plaintiff filed a motion for a confirmation of the sale at chambers, and gave notice of the hearing thereof, to be had on the 2d day of August, thereafter. At the time set for hearing the motion to confirm, the appellant objected to the confirmation of the sale, on the ground that his motion to set aside the appraisement was undetermined, and the judge had no power in vacation to pass on such motion. On the 12th day of August, thereafter, the judge, at chambers, specifically overruled the motion last mentioned and confirmed



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the sale. From the order of confirmation, the defendant, Rudolph Huss, brings the case here on appeal.

Defendant urges that when an order of sale is issued, it is nothing more or less than an execution, and should have been returned within sixty days from its date. An order of sale is not necessary to the execution of a decree, directing realty to be sold by the sheriff. *Bristol Savings Bank v. Field*, 57 Neb., 670; *McKinley-Lanning Loan & Trust Co. v. Hamer*, 52 Neb., 709. In other words, the decree itself, standing on the records of the court, is sufficient to authorize the sheriff to proceed to a sale of the premises. Such being the case, we are unable to perceive how the issuance of an order by the clerk, under the seal of the court, commanding the sheriff to proceed to carry the decree into effect, would add to or take from the duties already imposed upon the sheriff by the terms of the decree. Had no such order issued, the sheriff might have proceeded to sell the premises at any time within the life of the decree. The issuance of the order of sale imposed no limitations on his powers in this regard. That the decree provided for the issuance of the order of sale is immaterial, so far as the question before us is concerned. *Bristol Savings Bank v. Field*, *supra*. It follows, there is no merit in the objection that the sale was made after the expiration of sixty days from the date of the order of sale. We have not overlooked *Burkett v. Clark*, 46 Neb., 466. But, to the extent that it conflicts with the foregoing views, in our opinion, it should be overruled.

It is next urged by the appellant, that the appraisal is too low. Such objections must be raised by motion to vacate the appraisement filed in the case before the sale takes place. *Overall v. McShane*, 49 Neb., 64; *McMurtry v. Columbia National Bank*, 53 Neb., 21; *Hamer v. McFeggan*, 51 Neb., 227. No motion covering that ground was filed in this case before the sale, and for that reason the objection is not available.

It is next urged that the motion to set aside the appraisement was on file, and not disposed of, when the sale

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was confirmed at chambers, and that the judge had no authority to pass on the motion to confirm, until the motion to set aside the appraisement had been disposed of. In passing upon the motion to confirm the sale, the court is required to examine, carefully, the proceedings of the officer, and to be satisfied that the sale has, in all respects, been made in conformity to law. The statute, conferring jurisdiction upon the judge to confirm the sale at chambers, imposes the same duties on him. It necessarily follows that in confirming the sale, he must pass upon everything affecting its regularity, including objections to the appraisement. In making the order of confirmation, the judge overruled the objections urged against the regularity of the sale as certainly as though they had been specifically mentioned, and in so doing was acting within the jurisdiction conferred upon him by statute.

Section 498 of the Code of Civil Procedure provides that "when any sale is confirmed in vacation, the judge confirming the same shall cause his order to be entered on the journal by the clerk." Appellant contends that the record fails to show that the judge directed the clerk to enter the order of confirmation on the journal and for that reason it is of no effect. We find the order of confirmation in the record. We do not find that any motion has been made to expunge it. By this appeal, it is conceded that it is an order made by the judge. Under such circumstances we do not think the objection merits serious consideration.

The remaining ground of complaint is that the judge, in addition to confirming the sale, granted a writ of assistance. In this respect we think the learned judge transcended his authority. His jurisdiction at chambers is limited to the confirmation of the sale. Being purely statutory it should be confined strictly within the statutory limits.

It is therefore recommended that the order of the judge confirming the sale be affirmed, and that his order grant-

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ing the writ of assistance be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur. .

The order of confirmation is affirmed, and the order granting the writ of assistance is reversed, and the cause remanded for further proceedings according to law.

AFFIRMED IN PART, REVERSED IN PART.

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WILLIAM J. BROWN ET AL. V. HENRY H. COLLINS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED M. COLLINS, DECEASED.

FILED DECEMBER 4, 1901. No. 10,627.

Commissioner's opinion. Department No. 1.

1. **Errors Not Urged in Briefs.** Errors not urged in the briefs will be disregarded.
2. **Evidence: INSTRUMENTS: SIGNATURES.** An acknowledged instrument, of a kind permitted to be acknowledged and recorded, is admissible in proof without evidence of the authenticity of the signatures.
3. **Evidence: RECORD FROM FOREIGN STATE.** A judicial record of another state, authenticated as provided in section 414 of the Code, is admissible in evidence without further proof that the court from which it comes is one of record.
4. **Mortgages: FORECLOSURE: , PLEADING: EVIDENCE.** Where there is some evidence tending to support the allegation of no proceedings at law in a foreclosure suit, and no counter-showing attempted, decree of foreclosure will be affirmed.

ERROR from the district court for Lancaster county. Tried below before TUTTLE, J. *Affirmed.*

*Burr & Burr*, for plaintiffs in error.

*S. L. Geisthardt*, contra.

HASTINGS, C.

The errors complained of by the plaintiffs in this case are, first, that the decree is too large. No mention is made of this allegation in the briefs filed, and it will not be considered further.

The first error argued is the admission in evidence, without proof of the signatures, of the assignment of a mortgage from the Clark & Leonard Investment Co. to A. M. Collins, the testator of the defendant in error. The objection is not well taken. The instrument is duly acknowledged, and is under our statute entitled to be read in evidence without further proof. Compiled Statutes, chapter 73, section 13.

The next error urged is the admission in evidence of Exhibit "D," an exemplification of a will and its probate under which the plaintiff below claimed to be the owner of the mortgage. The objection is that the exhibit does not disclose that the orphans' court of the city and county of Philadelphia is a court of record. Section 414 of the Code of Civil Procedure provides that a judgment of another state may be proved by the attestation of the clerk and the seal of the court annexed, together with a certificate of the judge or presiding magistrate that the attestation is in due form. All of these requisites were complied with in this case, and the objection was properly overruled.

The third error urged is that there was no competent evidence on which to base a decree, because it was not proved that no action at law had been commenced or proceeding had to collect the debt. To this point the only testimony offered was that of the attorney, S. L. Geisthardt, who testified that he was familiar with the debt from its inception, and that no proceedings had been taken or action commenced at law to collect any part of it. It is urged that this is largely hearsay testimony, because the information of the witness seems to have been derived in part from other persons with whose business he was familiar and from whom he would have received information of any

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action on this paper. It was not necessary to produce the testimony of every person who had ever had any charge or control over this paper from its first execution down to the institution of this action in order to show that no proceedings had been had at law. It was a negative allegation in support of which some proof was adduced. The facts were as well in the knowledge of defendants as of plaintiffs, and no counter-showing was attempted. There appears no reason why the finding of the trial court should not be affirmed.

It is therefore recommended that the decree of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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CHARLES I. HILL ET AL. v. GUY PITT.

FILED DECEMBER 4, 1901. No. 10,637.

Commissioner's opinion. Department No. 2.

1. **Pre-emption: TITLE TO IMPROVEMENTS.** A person entitled by law to pre-empt a tract of land, or to hold it under the timber culture act, and who is recognized by the register and receiver of a United States land office, and is by them allowed to make a filing on a tract of the public land within their district legally open to pre-emption, takes the same and all permanent improvements thereon, if any, together with the exclusive right of possession thereof, free from the claims of all persons except the United States. *Hiatt v. Brooks*, 17 Neb., 33, followed.
2. **Evidence: INSTRUCTION AS TO INSUFFICIENCY OF PROOF.** When the evidence which has been offered is not sufficient in law to make out the case of the party who has offered it, it is the duty of the court to so instruct the jury. *Hiatt v. Brooks*, 17 Neb., 33, followed.

ERROR from the district court for Lincoln county.  
Tried below before GRIMES, J. *Affirmed.*

*French & Baldwin and Wilcox & Halligan*, for plaintiffs  
in error.

*Neville & Parsons, contra.*

OLDHAM, C.

This was an action for damages for trespass on real estate, originally instituted before a justice of the peace and taken by appeal to the district court for Lincoln county, Nebraska. The amount sued for was \$175. The cause was tried to a jury and verdict was rendered in plaintiff's favor for \$40. Judgment was rendered on the verdict and defendants bring error to this court.

There is only one question necessary to review under the pleadings and admissions in the record and that is, had plaintiff any right to maintain the action? Defendants admit that plaintiff had made a homestead entry on the land in dispute before the alleged injury was committed. They also admit that they took the lumber from the house and the window casings from the windows and the curbing from the well and the poles from the stable after plaintiff had made his filing on the land. They claim that they had a right to do this, because, as alleged in their answer, they had purchased all the lumber on these premises from a former entryman. The lumber taken had all been used in the building and roofing of the house and stable and in the curbing of the well, and none of it was loose lumber unconnected with the realty. Defendants' contention is that the title to the land was in the United States, and, as they tore this lumber from the buildings before plaintiff got actual possession under his homestead filing, plaintiff has no title on which he can maintain this cause of action.

In the case of *Hiatt v. Brooks*, 17 Neb., 33, the question involved in this case was determined against defendants' theory. COBB, C. J., in rendering the opinion says: "I understand it to be the law that when a pre-emptor on the public domain abandons his pre-emption, and leaves buildings or other permanent improvements thereon, he abandons such improvements. And another pre-emptor who becomes entitled to the land by reason of such abandonment would take it, together with all such per-

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manent improvements. It may be, considerations of natural justice would lead to the conclusion that a person who puts permanent valuable improvements on a tract of government land, in an unsuccessful effort to hold it by virtue of the pre-emption or homestead laws, should be allowed to take such improvements away at the end of unsuccessful litigation. But such a rule would be difficult of execution, of doubtful general utility, and never has been applied to cases of this kind." In that case, as in the case at bar, the trial court refused to submit defendant's contention to the jury at all and the court said: "When the evidence which has been offered is not sufficient in law to make out the case of the party who has offered it, it is the duty of the court to so instruct the jury."

The only other question to be determined is as to whether the trial court submitted the correct measure of damage to the jury, for this is the only question that it did submit. The trial court said: "The measure of plaintiff's damage is the difference between the value of the property injured, just before its injury, and the value of the property remaining after the injury." We think that this is a proper rule of damage, and as the jury only returned damages in the sum of \$40 we do not think defendants were in any way prejudiced in the measure of damage.

There are some complaints made of the action of the trial court in its rulings on the admission and exclusion of testimony; but there is nothing in the record that shows any error in this regard to the prejudice of the defendants. We therefore recommend that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

McLucas v. St. Joseph & G. I. R. Co.

WEEMS H. McLUCAS ET AL. V. THE ST. JOSEPH & GRAND  
ISLAND RAILWAY COMPANY.

FILED DECEMBER 4, 1901. No. 10,642.

Commissioner's opinion. Department No. 3.

**Appeal and Error: FINAL ORDER.** To entitle a party to a review there must have been a final order or judgment rendered in the cause. *Reynolds v. City of Tecumseh*, 48 Neb., 785.

ERROR from the district court for Jefferson county.  
Tried below before STULL, J. *Petition in error dismissed.*

*E. H. Hinshaw*, for plaintiffs in error.

*M. A. Reed, W. P. Freeman and M. A. Hartigan*, contra.

DUFFIE, C.

This action was commenced by the St. Joseph and Grand Island Railway Company against Weems H. McLucas and John C. McLucas to recover possession of certain lands in the city of Fairbury, claimed by it as a part of its right of way. The defendants claimed title to the land by adverse possession, asserting that they had been in the actual, exclusive, adverse possession thereof for more than fifteen years. A trial was had to the court, and December 10, 1898, the court made certain findings of facts, but the record does not disclose that any final judgment in the case has ever been entered. What is called the findings and judgment concludes as follows:

"That the plaintiff recover against the defendants the costs of this action, taxed at \$——, to all of which the defendants except. Motion for a new trial filed, argued and submitted. Motion for new trial overruled, to which the defendants except. Judgment on findings; forty days are given by the court to the defendants to prepare and present a bill of exceptions. The supersedeas bond in this case is fixed at \$200."

To entitle a party to a review, there must be a final order or judgment rendered in the case. A mere judgment



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for costs is not reviewable before final judgment. *Reynolds v. City of Tecumseh*, 48 Neb., 785; *Smith v. Johnson*, 37 Neb., 675; *Sprick v. Washington County*, 3 Neb., 253. In the present condition of the record, we have no jurisdiction to review the case, and we therefore recommend that the petition in error be dismissed.

AMES and ALBERT, CC., concur.

PETITION IN ERROR DISMISSED.

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WILLIAM TIGHE ET AL. V. JOSEPH W. WINGER.

FILED DECEMBER 4, 1901. No. 10,648.

Commissioner's opinion. Department No. 3.

**Action:** MOTION TO REINSTATE: EVIDENCE. The denial by a district court of a motion to reinstate an action, voluntarily dismissed at the same term at which the motion is made, will not be reversed in the absence of evidence that the party making the application was laboring under some mistake or misapprehension of fact at the time of the dismissal.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

*Willard E. Stewart*, for plaintiffs in error.

*A. W. Field*, contra.

AMES, C.

While the history of the litigation of which this case is a part, extends through many years, and is marked by many vicissitudes, the facts pertinent in the present inquiry are few and may be briefly stated. An action in the district court in which the plaintiff in error was defendant, had resulted in a judgment against him and was pending here upon a petition in error. At the same time there was pending in the district court a petition for a new trial, under section 314 of the Code of Civil Procedure, on the ground of newly discovered evidence. This

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court affirmed the judgment, because of a failure of the plaintiff in error to serve and file a brief within the time prescribed by the rules. The plaintiff in error then filed a motion for a rehearing in this court, and while that motion was pending, and solely in reliance upon his own opinion that the motion would be granted and that upon final argument the judgment of the district court would be vacated and a new trial granted, voluntarily dismissed his petition in the trial court. Afterwards this court granted the motion for a rehearing, but immediately and by the same order dismissed the petition in error, which action had the practical effect of affirming the judgment for the reversal of which the proceedings were begun. Thereupon the plaintiff in error applied by motion to the district court at the same term at which the order of dismissal was entered, for an order reinstating his petition for a new trial, and supported the application by affidavits setting forth the facts above recited, together with others which we do not deem material. It was not asserted in these affidavits, nor is it claimed now, that at the time of dismissing his petition the plaintiff was laboring under any mistake or misapprehension of fact, but his sole ground of complaint was and is, of having been surprised by the order of this court dismissing his petition in error. The petition for a new trial had been pending several years, and had suffered two previous dismissals, and the court, upon consideration of the matter, denied the motion to reinstate. This proceeding is a petition in error to review the last mentioned order. We do not consider that the matter alleged in support of the motion to reinstate shows reasonable occasion for surprise to an attorney who has been a member of this bar for a quarter of a century. The district court did not commit an abuse of discretion in denying the motion to reinstate.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Johns v. Kamarad.

JOSEPH JOHNS V. LOUIS KAMARAD ET AL.

FILED DECEMBER 4, 1901. No. 10,651.

Commissioner's opinion. Department No. 2.

1. **Unfiled Chattel Mortgage: SALE UNDER EXECUTION: RIGHTS OF PURCHASER.** Where the mortgagee of chattels is not in possession and his mortgage is not on file at the date of the levy, a purchaser at execution sale under a judgment against the mortgagor will take free of the mortgage though he had notice thereof prior to the sale.
2. **Growing Crops: LEVY UPON AND SALE OF THEM.** Growing crops are subject to levy and sale irrespective of their stage of growth.

ERROR from the district court for Valley county. Tried below before THOMPSON, J. *Affirmed.*

*A. M. Robbins*, for plaintiff in error.

*Clements Bros., contra.*

POUND, C. •

The plaintiff was the holder of a chattel mortgage upon the landlord's share in a growing crop. The principal defendants were purchasers of the crop at execution sale under a judgment against the mortgagor. The mortgage was not on file at the date of the levy, but it appears that the purchasers were informed and knew of its existence prior to the sale. On this ground, plaintiff claims that they took subject thereto. Under the well settled construction of section 14, chapter 32, Compiled Statutes, the mortgage was void as to execution creditors of the mortgagor, whether they had actual notice of the mortgage or not. *Farmers & Merchants Bank v. Anthony*, 39 Neb., 343; *Spaulding v. Johnson*, 48 Neb., 830. If the mortgage is void as to the creditor, of what avail is this unless the law gives a title free of the mortgage to the purchaser at execution sale? To hold that the purchaser takes subject to a mortgage because of notice although the levy creates a superior claim notwithstanding notice would

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nullify the rule. The court indicated the correct view in *Farmers & Merchants Bank v. Anthony*, 39 Neb., 343, 350, but without expressly deciding the point, and we think *Railsback v. Patton*, 34 Neb., 490, so far as in conflict therewith ought to be overruled.

It is also contended that the levy and sale were void because the growing crop in question was so immature and in such an early stage of growth that it was not subject to levy. This court has held that growing crops are subject to levy. *Sims v. Jones*, 54 Neb., 769. But it is argued that the crop levied upon in that case was further advanced than the crop sold in this case. We see no force in this distinction. If the crop was sufficiently advanced to be sold or mortgaged by the owner, it was subject to sale by the sheriff. If it was not, plaintiff, who claims as mortgagee, has no case. In *Polley v. Johnson*, 52 Kan., 478, 35 Pac. Rep., 8, quoted with approval in *Sims v. Jones*, the crop was no further advanced than in the case at bar. We perceive no point at which the line may be drawn short of the extremes. If the crop may be levied on before maturity at all, it must be subject to levy from the time when there begins to be a growing crop in fact irrespective of the stage of growth. We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

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HENRY FISHER ET AL. V. ALEXANDER BUCHANAN.

FILED DECEMBER 4, 1901. No. 10,654.

Commissioner's opinion. Department No. 3.

1. **Pleading:** PETITION: SUFFICIENCY. Petition examined, and *held* that the facts therein stated are insufficient to constitute a cause of action.
2. **Specific Performance:** ALLEGATIONS OF PETITION: PROOF. Where, by the terms of a contract, the conditions to be performed by the respective parties are concurrent, the plaintiff, in an action for specific performance, must allege and prove performance, or a

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tender of performance, of the conditions on his part to be performed, or such facts as will show that such tender would have been unavailing.

ERROR from the district court for Douglas county.  
Tried below before FAWCETT, J. *Reversed.*

*Smyth & Smith* and *J. J. O'Connor*, for plaintiffs in error

*John T. Cathers, contra.*

ALBERT, C.

This action was brought by Alexander Buchanan, against H. A. Fisher and Thomas Simanek, to enforce specific performance of an alleged contract for the sale of real estate. The trial court found for the plaintiff, and decreed accordingly. The defendants bring the case here on error.

The first ground urged for a reversal of the decree of the trial court is, that the petition does not state facts sufficient to constitute a cause of action. The petition, so far as is material at this time, is as follows:

"That on the 25th day of May, 1897, the said H. A. Fisher was the owner in fee simple of the following described real estate, to-wit: Lots seven and eight in block ninety, South Omaha, as surveyed, platted and recorded, all in the county of Douglas and state of Nebraska, and on said 25th day of May, the plaintiff and the defendant, H. A. Fisher, entered into a written agreement whereby the said Fisher sold said lots to the plaintiff for and in consideration of the sum of four hundred dollars (\$400), for his equity and all interests which said Fisher had in said lots over and above a certain mortgage in the sum of seven thousand dollars (\$7,000), and it was agreed by and between the parties that in consideration of the sum of four hundred dollars (\$400), the said Fisher was to convey said lots to the plaintiff by a good and sufficient warranty deed; a copy of which written

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agreement is hereto attached marked 'Exhibit A,' and made a part of this petition, said sum of money to be paid by the plaintiff to the said H. A. Fisher upon his making to the plaintiff a good and sufficient warranty deed for said premises, the plaintiff to assume and pay said mortgage of \$7,000, which was to be in full consideration for said lots.

"2d. On the 28th day of May, 1897, in pursuance of said written agreement whereby the said H. A. Fisher did sell and convey said lots to the plaintiff, the plaintiff paid to the said H. A. Fisher the sum of one hundred dollars (\$100) as part payment on said contract for said lots, and the said H. A. Fisher received the said one hundred dollars and gave the plaintiff his written receipt therefor; a copy of which is attached to this petition, marked 'Exhibit B' and made a part thereof.

"3d. On the 24th and 25th days of June, A. D. 1897, according to the terms of said written contract the plaintiff duly tendered to the said H. A. Fisher the sum of three hundred dollars, the balance of said sum of four hundred dollars and requested the said Fisher to convey the said premises to the plaintiff as provided by said written agreement, by a good and sufficient warranty deed, but the said H. A. Fisher refused and still refuses to execute and deliver such conveyance.

"4th. The plaintiff has duly performed all the conditions of said agreement on his part and is ready and willing to pay said purchase money, and now brings the sum of three hundred dollars, the balance of the purchase money, into court and offers the same to the said H. A. Fisher, upon his executing and delivering to the plaintiff a good and sufficient conveyance of said premises according to the terms of said contract."

"Exhibit A" referred to in the petition, is as follows: "South Omaha, Neb., May 28, 1897. This is to certify that I, H. A. Fisher, of Wahoo, Neb., have this day sold my equity to A. Buchanan, of Omaha, in lots 7 and 8, block 90, So. Omaha, for four hundred dollars, and said

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money to be paid on transfer of equity. H. A. Fisher, A. Buchanan."

It will be seen, from a study of the petition, that the defendant relies on a written contract, and that "Exhibit A" is the contract upon which he relies. That document contains no mutual promises nor agreements, and does not fall within any recognized definition of the term contract. It is not a contract. *Darr v. Mummert*, 57 Neb., 378. The most that can be said for it is, that it is a memorandum of a contract. But this action is based, not on any contract of which this document might be a memorandum, but on the alleged written contract, "Exhibit A." As we have seen, that document is not a contract; consequently, it will not support this action. *Darr v. Mummert, supra*.

There is another reason why the decree of the district court must be reversed. The trial court appears to have treated "Exhibit A" as a memorandum of the contract, and, on the proof submitted, found that one of the conditions of the contract between the plaintiff and the defendant Fisher was, "that the plaintiff was to assume the mortgage upon said lots in the sum of \$7,000, and to pay the same." There is no evidence whatever that the plaintiff ever performed or offered to perform this condition, nor of any facts that would excuse his failure in this regard in an action of this kind. That such omission is fatal, is elementary.

It is therefore recommended that the decree of the district court be reversed, and the cause remanded for further proceedings, according to law.

**AMES and DUFFIE, CC., concur.**

**REVERSED AND REMANDED.**

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HELEN Z. GILLESPIE ET AL. V. WESTEL W. MORSMAN.

FILED DECEMBER 4, 1901. No. 10,659.

Commissioner's opinion. Department No. 2.

1. **Mortgages: OBJECTIONS TO CONFIRMATION OF SALE: TIME FOR MAKING.** Objections to the confirmation of a judicial sale made and filed after the sale has been confirmed will not be considered. The proper practice in such cases is by motion to vacate and set aside the sale.
2. **Appeal and Error: SUPERSEDEAS BOND: CONDITIONS.** A supersedeas bond not conditioned as required by statute is insufficient to prevent the enforcement of the judgment or decree it was given to supersede.

ERROR from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*F. M. O'Linn*, for plaintiffs in error.

*Westel W. Morsman*, contra.

OLDHAM, C.

This action comes from the district court for Douglas county by an appeal from an order of confirmation of a judicial sale made under a decree foreclosing a mortgage on real estate. There were no objections made at the time of confirmation but subsequent thereto there was filed in the same court a motion by the appellants (defendants below) which asked "that an order be entered herein vacating, recalling, rescinding and holding for naught the purported order of sale in the above entitled case dated May 25, 1898, and the return of the sheriff indorsed thereon and the purported *alias* order of sale therein, dated September 14, 1898, and the return of the sheriff indorsed thereon for the following reasons." This motion sets up fifteen specific objections to the confirmation of the sale. Treating this request as a motion to set aside the order of confirmation of sale, which must be done to give it any legal standing, there is but one complaint set forth



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in these objections that would be ground to set aside the sale, and that is, in effect, that the decree had been superseded by bond and was then pending in the supreme court.

The record discloses that a decree of foreclosure was rendered on which this sale was based on November 24, 1897, and that a bond was filed on February 28, 1898, and a petition in error and transcript were filed in the supreme court on June 24, 1898. So then the proceedings that were pending in the supreme court were proceedings in error and not appeal. The condition of this bond, which it is claimed effected this supersedeas is as follows: "Now, therefore, we, John A. Gillespie as principal and George H. Payne as surety do hereby undertake to said Westel W. Morsman in the sum of two hundred dollars that if the said John A. Gillespie and Helen Z. Gillespie shall prosecute such appeal without delay and will not, during the pendency of this appeal, commit or suffer to be committed any waste upon the real estate in controversy, then this obligation shall be null and void, otherwise to be and remain in full force and effect." This would probably have been a sufficient bond on appeal, but does it fulfill the requirements of the statute upon error proceedings? As supersedeas proceedings were unknown to the common law, the right, when it exists, is given by statute only, and to the statute we are relegated for the requirements to effect this object.

Section 588 of the Code of Civil Procedure of this state is the section of our statute that gives the right and fixes the condition that will effect supersedeas in error proceedings. The third subdivision of that section, and the one applicable to this inquiry, is as follows: "Third. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by any court of record, or any judge thereof, to the effect that during the possession of such property by the plaintiff in error, he will not commit or suffer to be committed any waste thereon, and if the judgment be

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affirmed he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession pursuant to the judgment, and all costs." It is obvious that this bond is not in accordance with the provisions of this statute, and it is the uniform holding of this court that a supersedeas bond, not conditioned as provided by statute, is insufficient to prevent the enforcement of the decree it was given to supersede. *State v. Thiele*, 19 Neb., 220; *O'Chander v. State*, 46 Neb., 10; *State v. Ramsey*, 50 Neb., 166. Hence we conclude that the district court did not err in overruling the motion to vacate the sale.

Complaint is also made that a sheriff's deed was issued prematurely for this property. It is sufficient to say on this point that the record does not disclose any deed nor the time when made, if made. It also appears from the record that the bond in this case—the appeal from the confirmation of sale—is only conditioned "to pay costs" if the case is affirmed, and does not conform to the statute in such cases made and provided, and for this cause it is ineffectual to stay proceedings under the judgment appealed from.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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ROBERT G. BROWN V. NAOMI SILVER.

FILED DECEMBER 4, 1901. No. 10,676.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: EXCLUSION OF IMMATERIAL MATTERS.** Error can not be predicated on the action of the trial court in excluding immaterial matters from the consideration of the jury.
2. **Limitation of Actions: WHEN BEGINS TO RUN.** The statute of limitations does not begin to run until a right of action has accrued.

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3. **Trial: MISCONDUCT OF COUNSEL: REBUKE BY JUDGE.** When counsel, in their overzeal, in the argument of a case to a jury depart from the record, a sharp and prompt rebuke from the trial judge will ordinarily cure the error.
4. **Contracts: VARIANCE.** There is no variance between an allegation on a verbal contract and an unsigned memorandum of such contract alleged to have been made by the party charged at the time the contract was entered into, because such unsigned memorandum is not a written contract.
5. **Appeal and Error: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to sustain the judgment.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

*Leslie G. Hurd and R. G. Brown, for plaintiff in error.*

*Geo. W. Bemis, contra.*

OLDHAM, C.

This was an action for the recovery of \$1,333.33 alleged to have been due from the defendant to the plaintiff as a part payment of the purchase price of a tract of land. The petition alleges that the tract of land was sold by the plaintiff and her husband, Espy E. Silver, to the defendant for the agreed price of \$2,500; that by the terms of the sale the defendant paid plaintiff and her husband \$500 in cash and assumed a mortgage for \$600 on the premises and also agreed to pay the interest on a mortgage of \$1,333.33, which had been executed on the premises by plaintiff and her husband to secure an annuity of \$80 to Rachel Silver, the mother of plaintiff's husband; and that at the death of Rachel Silver the defendant agreed to pay the remainder of the purchase price, \$1,333.33, to plaintiff's husband, Espy E. Silver. The petition alleges the death of Rachel Silver on July 14, 1896, and that the account for the balance of the purchase money was duly assigned by Espy E. Silver to this plaintiff before the institution of this suit. Plaintiff attached to her petition a memorandum, alleged to have been in the hand-

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writing of the defendant, and delivered to Espy E. Silver at the time of the purchase of the land, which was unsigned, and read as follows: "Due Espy E. Silver \$1,333.33."

Defendant filed numerous answers to this petition and the case appears to have been tried on his third amended answer. By this answer he admitted the purchase of the land from Espy E. Silver and plaintiff; denied that the consideration was \$2,500 and claimed that the only consideration which he agreed to pay, as the purchase price of the land, was \$500 which he paid in cash at the time of the purchase, the assumption of the \$600 mortgage and the payment of the annuity of \$80 to Rachel Silver during her lifetime. The answer admits the death of Rachel Silver, as alleged in plaintiff's petition, and denies that there is anything due on the purchase price of the land. There were other allegations in the answer of immaterial matters but nothing else tending to state a defense. Plaintiff replied, denying the new matter in defendant's answer. There was a trial to a jury and a verdict was returned for plaintiff for the amount sued for; judgment was rendered on the verdict, and defendant brings error to this court. The parties will be designated in this opinion as they were in the court below.

The alleged errors called to our attention in defendant's brief are the rulings of the trial court in the admission and exclusion of testimony; the giving of instructions; alleged misconduct of plaintiff's counsel; and the insufficiency of the evidence to sustain the verdict. The allegations of error, with reference to the action of the trial court, in the admission and exclusion of evidence, are difficult to consider in the manner presented in defendant's brief for the reason that the only serious allegations are based on an absolute, inexcusable and reprehensible misstatement of the facts as shown by the record. The misstatement of facts begins with the contention that the court erred in not permitting defendant to file a third amended answer, when the record shows specifically that the court

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did permit defendant to file this answer. This misstatement is followed by another which alleges that because the court had failed to permit this answer to be filed that it excluded certain testimony of the defendant tending to prove an alleged contract between Espy E. Silver and his mother, Rachel Silver, by which the mortgage given to secure her annuity should be satisfied at her death. The record shows that instead of excluding this evidence the court admitted it, and overruled plaintiff's motion to strike it out. There is no dispute about the mortgage given by Espy E. Silver to Rachel Silver. It was introduced in evidence and it showed on its face that it was to be satisfied by the payment of an annuity of \$80 to Rachel Silver during her natural life.

Plaintiff's contention was that when the mortgage was extinguished by the payment of the annuity and the death of Rachel Silver that the remainder of the purchase price, \$1,333.33, became due and that this was the agreement made with the defendant at the time the land was purchased, but plaintiff did not contend that this mortgage continued to exist after the death of Rachel Silver. The only contest over that question between the plaintiff and defendant was that defendant claimed that plaintiff and Espy E. Silver had a written contract with Rachel Silver providing that the mortgage should terminate with her death. Plaintiff admitted that this was the contract and understanding, but denied that there was ever a written contract to this effect, except such as was contained in the mortgage. This issue was absolutely immaterial, and no error could be successfully predicated on the ruling of a court in excluding such an immaterial matter.

Defendant complains of the action of the trial court in admitting the memorandum set up in plaintiff's petition which read, "Due Espy E. Silver \$1,333.33," but the record shows that this exhibit was admitted without any objection on defendant's part and it is now too late for him to complain of this action of the trial court.

It is contended by defendant that if any right of action

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ever existed on this contract it has been barred by the statute of limitations, but we cannot concede this, for if the contract was as alleged by plaintiff, this \$1,333.33 was not due until the death of Rachel Silver, and it is admitted that she died on the 14th day of July, 1896, and the record shows that this petition was filed on the 11th day of February, 1897; hence the statute of limitations did not begin to run against this claim until a right of action had accrued upon it, *i. e.*, the 14th day of July, 1896.

A contention is made by the defendant that there is a variance between the allegation of the petition which declares on an oral contract and the written memorandum attached to the petition, but we cannot agree with this contention. The paper which bore the writing "Due Espy E. Silver \$1,333.33" was not a written contract; it was neither dated nor signed by anyone and was only admitted for the purpose of showing an admission of the defendant that the amount therein stated was due and unpaid. The testimony of Espy E. Silver and plaintiff, with reference to this memorandum, was that they wanted defendant to give them something that would show that he still owed them this amount of money and that he, defendant, handed Espy E. Silver this memorandum after he had paid Silver the \$500 on the contract.

The instructions given by the trial court were models of brevity and precision. They confined the jury strictly to the question, as to whether the defendant agreed to pay this \$1,333.33 as a part of the purchase price of the land to Espy E. Silver after the mortgage to Rachel Silver had been extinguished by her death, and properly told the jury that the burden was on the plaintiff to prove this allegation by a preponderance of the evidence. The jury was also instructed that unless they found, from the evidence, that defendant had agreed to pay this sum at the death of Rachel Silver to Espy E. Silver they should find for the defendant. The other instructions were merely a statement of the issues and admissions and an instruction defining the preponderance of evidence, and we find noth-

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ing in any of the instructions that could possibly have prejudiced the defendant.

The next question called to our attention in defendant's brief is the alleged misconduct of plaintiff's counsel in his closing argument to the jury. It appears from the record that in closing the case plaintiff's counsel engaged in a wordy altercation with one of the counsel for defendant and that he attempted to go outside of the record, as he claimed, to defend himself against an attack made on him by one of defendant's counsel; but be this as it may, the court promptly checked him and compelled him to withdraw everything he had said outside of the record from the jury. When counsel in their overzeal in the argument of a case depart from the record a sharp and prompt rebuke from the trial judge will ordinarily cure the error, and, we think, in this case that was all that was necessary.

There is also complaint made about the latitude which plaintiff's counsel took in his argument to the jury. This matter was presented by affidavits and counter-affidavits to the court below, and as we see nothing necessarily prejudicial in the argument ascribed to plaintiff's counsel we do not feel justified in disturbing the findings of the trial court on that question.

The next question brought to our attention is as to the sufficiency of the evidence. The record shows that the contract was positively testified to by the plaintiff and her husband; the deed offered in evidence recited a consideration of \$2,500; the written memorandum testified to by plaintiff and her husband was identified by experts as being, in their opinion, in the handwriting of the defendant. Two other witnesses testified that defendant told them that he bought the place for \$2,500, and one of them, a brother of Espy Silver, testified that defendant told him all about the contract; and that at one time he had an assignment of this claim against the defendant and that defendant told him that he would pay it when it became due. This array of testimony was met by a denial from

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the defendant and practically nothing more. From this evidence, we think, the verdict was fully justified.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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ANNIE R. HOLT ET AL. V. THE RUST-OWEN LUMBER COMPANY.

FILED DECEMBER 4, 1901. No. 10,680.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: CONFLICTING EVIDENCE.** Findings based on conflicting evidence will not be disturbed.
2. **Foreign Corporations: ACTION BY.** A foreign corporation may sue in the courts of this state without a compliance with the provisions of section 215, chapter 16, Compiled Statutes.
3. **Mortgages: FORECLOSURE. PLEADING.** That no proceedings at law have been had for the recovery of the debt, is a material allegation in a petition for the foreclosure of a mortgage, and if put in issue it must be established by proof.
4. **Executors and Administrators: SALES: RATIFICATION.** Where an administrator transfers a note, past due, belonging to the estate without an order of the county court, and receives therefor the full amount due thereon, and such transfer is afterward approved and confirmed by the county court, the transferee takes a good title, which dates from the time of the transfer.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Reversed.*

*L. W. Colby and Rinaker & Bibb, for plaintiffs in error.*

*E. N. Kauffman and A. D. McCandless, contra.*

ALBERT, C.

This action was brought by The Rust-Owen Lumber Company, to foreclose a mortgage executed and delivered by the defendants to one J. W. Rowley. There was a find-



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ing and decree for the plaintiff, and the defendants bring the case here on error.

The first point relied on for a reversal is, that the plaintiff is not a legal corporation nor qualified to do business in this state, and that it lacks legal capacity to bring this suit. The evidence shows that the plaintiff is a corporation, duly organized under the laws of a sister state. It is not alleged, nor does it appear in evidence, that it had complied with section 215, chapter 16, Compiled Statutes, which provides for the filing of a copy of the charter of a foreign corporation. The defendants urge that such omission is fatal. This court has held otherwise. *Schmitt & Brother Co. v. Mahoney*, 60 Neb., 20.

It is next argued that the suit was premature for the reason that the time of payment had been extended. Issue was joined on that question, and it was submitted to the court on conflicting evidence, from which reasonable minds might draw different conclusions; under the settled rule of this court, the finding of the trial court on that issue will not be disturbed.

It is urged further, that the plaintiff was not the owner of the note at the commencement of the action. The payee of the note died January 6, 1895. May 10, 1897, letters of administration on his estate duly issued to Mary L. Rowley, his widow. On the 6th day of June, following, she transferred the note and mortgage to the plaintiff for the full amount due thereon. It does not appear that such transfer was preceded by any order of the county court authorizing it. Afterward and during the pendency of this action, the transfer was approved and confirmed by the county court. In view of the record, we do not deem it necessary or advisable to enter upon a discussion of the mooted question, whether an order of the county court is essential to the validity of a sale of personal property by an administrator. In this case, the note was past due. The statute not only authorized, but required, the administratrix to collect it. She sold it for the full amount due thereon, and the transaction received the sanction of

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the county court. Under these circumstances we think the plaintiff acquired a good title to the note, and that such title dates from the time of the transfer.

Another objection urged by the defendants is, that plaintiff failed to show that no proceedings at law had been had for the recovery of the debt. An allegation to that effect in the petition was put in issue by the general denial of the defendants. Such allegation has been held to be material and one that must be established by the proof. *Kirby v. Schrader*, 58 Neb., 316. No proof was offered in support of the allegation. The omission, in this regard, is fatal to the decree, nor will the fact that such allegation was met by a general, instead of a specific, denial operate to relieve the plaintiff from the effect of such omission. *Kirby v. Schrader, supra*.

We recommend that the decree of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

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LAVINA A. BOALES ET AL., APPELLANTS, v. E. I. FERGUSON,  
ADMINISTRATOR OF THE ESTATE OF EMILY A. PAUL,  
DECEASED, APPELLEE.

FILED DECEMBER 4, 1901. No. 10,696.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: JUDGMENTS OF DISTRICT COURT ON APPEAL FROM PROBATE COURTS.** Judgments of the district court rendered on appeal from the probate side of the county court are reviewable only by petition in error.
2. **Appeal and Error: JURISDICTION BY CONSENT.** This court can not acquire jurisdiction to review such a judgment on appeal by consent of the parties.

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APPEAL from the district court for Saline county. Tried below before HASTINGS, J. *Appeal dismissed.*

*Thomas Ryan and James W. Dawes*, for appellants.

*J. D. Pope*, contra.

POUND, C.

This is an appeal from a judgment of the district court rendered on an appeal from the county court in the settlement of an estate. It is manifest that we cannot review the judgment by appeal. Orders and judgments of the county court in its probate jurisdiction are reviewable in this court only by petition in error. *Whalen v. Kitchen*, 61 Neb., 329, 85 N. W. Rep., 278. Appellant has urged that the appellees have waived this objection by not raising it in their briefs nor until the court called attention thereto at the hearing. Consent, however, cannot give jurisdiction over the subject-matter. The court has no power to review the judgment in the absence of a petition in error filed in the time fixed by law. We recommend that the appeal be dismissed.

SEDGWICK and OLDHAM, CC., concur.

THE APPEAL IS DISMISSED.

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GERTRUDE T. EDNEY, ADMINISTRATRIX WITH THE WILL  
ANNEXED OF THE ESTATE OF JAMES A. EDNEY, DE-  
CEASED, v. JAMES E. BAUM ET AL.

FILED DECEMBER 4, 1901. No. 12,142.

Commissioner's opinion. Department No. 2.

1. **Executors and Administrators: ABATEMENT.** An action does not abate by the removal or discharge of an administrator as party plaintiff during its pendency.
2. **Action: DISMISSAL: REINSTATEMENT IN EQUITY.** A suit in equity may be maintained for the purpose of reinstating a case erroneously dismissed, when there is no adequate legal remedy therefor.

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**ERROR** from the district court for Lancaster county. Tried below before BAKER, J. *Reversed with directions.*

*Richard Cunningham* and *Geo. A. Adams*, for plaintiff in error.

*Burr & Burr, contra.*

OLDHAM, C.

This litigation was begun a number of years ago and phases of it have been before this court before. *Edney v. Baum*, 44 Neb., 294; *Edney v. Baum*, 53 Neb., 116; *Edney v. Baum*, 59 Neb., 147. The phase of the case now presented arises on a petition filed by Gertrude T. Edney, as administratrix of the Edney estate, in the district court for Lancaster county, Nebraska, for the purpose of having an order formerly made by that court, dismissing her action, set aside and the case reinstated.

The action of the court complained of in this petition is in substance, that an action was pending in said court, brought by the administratrix and executor of the Edney estate against the Baums for damages for deceit and false representations in a trade of a stock of hardware for certain real estate. That this case had proceeded to trial and verdict when the defendants, Baum, filed their motion for a new trial, and as one of the grounds thereof, alleged that the administratrix and executor had been discharged of their office by the probate court in which they had been appointed before the trial commenced, and as a consequence thereof they had no legal capacity to maintain the suit. Upon the hearing of this motion the court set aside the verdict and dismissed the action. The action so dismissed is now sought to be reinstated. The defendants Baum filed their answer to this petition of the administratrix in this case and a trial was had thereon which resulted in a finding for the defendants, and a judgment dismissing the petition, whereupon Mrs. Edney, as administratrix, prosecutes error to this court.

It is urged that the findings and judgment of the trial

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court are contrary to law. The court, by its findings, held that the letters of administration of the parties claiming to be plaintiffs had been revoked and annulled by the county court of Douglas county, and that court had jurisdiction of both the parties and the subject-matter. Conceding this to be true, does this fact abate the action? It is not claimed that this revocation was made before the inception of the action. The record shows that this alleged revocation was made on the 29th day of February, 1896, while the record discloses that this action had been pending for a number of years prior thereto; had been once tried, taken to the supreme court, reversed and remanded. *Edney v. Baum*, 44 Neb., 294.

Section 336, chapter 23, Compiled Statutes provides, that: "When an executor or administrator shall die, be removed from office, or resign, or when his letters shall be revoked, during the pendency of any suit in which he is a party, the suit may be prosecuted by or against the executor or administrator appointed in his place, if any shall be appointed, in like manner as if it had originally been commenced by or against such last executor or administrator." Section 45 of the Code of Civil Procedure provides that: "An action does not abate by the death, marriage or other disability of a party or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and in case of the death or other disability of the party, the court may allow the action to continue by or against his representative or successor in interest." It is clear from these provisions of the statute that the action does not abate because the representative capacity of the plaintiffs had terminated. The right of the plaintiff to carry on the suit may have terminated, but this did not authorize the court to dismiss the action, nor was it legal ground upon which the court could dismiss it, and its action in this respect was clearly erroneous.

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The remaining question is, can this error of the trial court be corrected by this proceeding? A suit in equity for this purpose can only be maintained when there is no adequate legal remedy, and only then to prevent a failure of justice. When this judgment of dismissal was rendered there was no one before the court, clothed with authority to represent the decedent's estate. All these proceedings were had in the absence of any representation of this estate and what was done was not binding on the estate. It had no day in court. There was no one who could complain, prosecute error or appeal. The *quondam* personal representatives attempted to prosecute error from this judgment, but their petition was dismissed for want of interest. *Edney v. Baum*, 53 Neb., 116. At this time there was no personal representative in existence, at least none which the court, by reason of the record of the probate court, would recognize as such. Then, there was no one who could prosecute error from this action of the trial court. This being so, the legal remedy is gone. But this does not extinguish the right of the personal representatives of this estate to have this action tried on its merits. This so-called trial was nothing, binding no one, because it was not a trial between the personal representatives of this estate and the defendants, but between strangers to the estate and the defendants, and hence no trial in fact and in law. Equity never suffers a wrong without a remedy, and whatever may be the merit or demerit of that suit, the personal representatives of this estate have the legal right to have their day in court and the case tried on its merits. This was not done through no fault of theirs.

There is some complaint made for the reason that Cavanaugh, as executor, does not join in this action. The petition shows him to be one of the parties plaintiff, and we find no disclaimer of his in the record. But if he refused to join as plaintiff this would not defeat the action, as under section 42 of the Code he may be made a defendant.

It is therefore recommended that the judgment of the

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district court be reversed and the cause be remanded with directions to the court below to reinstate the original case and proceed with its hearing as if no trial had ever been had.

SEDGWICK, C., concurs. POUND, C., having been of counsel, did not sit.

The judgment of the district court is reversed and the cause remanded with directions to the court below to reinstate the original case and proceed with its hearing as if no trial had ever been had.

REVERSED WITH DIRECTIONS.

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**SPELTS & KLOSTERMAN V. MIKE WARD.**

FILED DECEMBER 18, 1901. No. 10,485.

Commissioner's opinion. Department No. 1.

1. **Breach of Contract: ILLITERATE PARTY: BURDEN OF PROOF OF KNOWLEDGE.** Where one is dealing with an unlettered man, who can neither read nor write, and makes his mark to the instrument he executes, and there is testimony tending to show that he did not understand the contents of such paper, or that his signature was obtained by fraud, it is incumbent on the former to show by a preponderance of the evidence that the latter fully understood the object and import of the writing which he executed.
2. **Breach of Contract: FRAUD: NEGLIGENCE OF PARTY SIGNING.** In an action upon a contract, where the defense is that fraud was employed in securing the signature of one of the parties, the doctrine that the carelessness or negligence of the party in the signing of the contract estops him from disputing its contents is not applicable.
3. **Appeal and Error: INSTRUCTION: PROPER.** Instruction set out in the opinion examined, and *held* properly given.
4. **Appeal and Error: EVIDENCE: SUFFICIENCY.** Evidence examined, and found to sustain verdict and judgment.

ERROR from the district court for Seward county. Tried below before SEDGWICK, J. *Affirmed.*

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*Hastings & Hall and S. H. Steele*, for plaintiffs in error.

*George W. Lowley and R. S. Norval*, contra.

KIRKPATRICK, C.

Plaintiffs in error brought this action against defendant in error in the district court of Seward county to recover \$500 damages for breach of contract made July 1, 1890. Plaintiffs pleaded the execution of a contract, by the terms of which defendant agreed to sell them three thousand bushels of corn to be delivered in July or August, at the option of plaintiffs, at an agreed price of twenty-three and one-half cents per bushel; alleged that the sum of \$50 had been paid upon the contract, and that defendant had delivered two hundred and fifty bushels, refusing upon demand to deliver any more; that by reason of said failure and refusal, they had suffered damage in the sum of \$500 for which with interest and costs they prayed judgment. The answer denied the agreement as pleaded in the petition, but admitted the signing by mark of the written instrument set out; alleged that defendant could neither read nor write, and that the paper pleaded in the petition and signed by defendant did not represent the contract actually entered into, but that he had agreed to deliver to plaintiffs sufficient corn, at the price agreed upon, to cover the amount of money advanced; and that if he had a good crop of corn, he would sell to them all he could spare at the price named; that the corn which he had delivered amounted in value to \$9.77 more than the sum advanced, for which with interest he prayed judgment. The trial resulted in a verdict and judgment for defendant in the sum of \$9.77, with interest thereon, amounting to \$14.70. Plaintiffs in error ask for a review of this judgment by this court.

But two of the assignments in the petition in error are argued in brief of counsel, and the remainder will be deemed waived: (1) That there is not sufficient evidence to support the verdict; and (2) that the court erred in



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giving instruction No. 7, on its own motion. This case has been once before in this court on an appeal from a former trial. *Ward v. Spelts*, 39 Neb., 809.

The principal evidence in the case is that of Ward, defendant in error, and R. J. W. Reed, agent of plaintiffs in error, who prepared the contract. Ward testifies that he inquired of Reed at the Ulysses office of plaintiffs in error what he was paying for corn. Reed told him twenty-three and one-half cents, and asked if Ward had any to sell. Ward replied that he had a little, and that he needed some money for himself and for the boys who were working for him. He was not satisfied with the price, and thought he would try to get what money he needed at the bank. Reed thereupon told him that corn would go down, and that he had better sell what corn he had. Ward needed \$50 and offered to dispose of enough corn to Reed to amount to at least that sum at twenty-three and one-half cents, and that if he had a good crop he would sell to him all he could spare at that price; he thought he had between two and three thousand bushels, but would not want to sell any unless he had a good crop. Reed finally offered him a bonus of \$2.50 out of his own pocket, explaining if he got Ward's corn, he would get other corn in the same neighborhood. Ward further testified that the corn was to be delivered in August or September, when Reed wanted it. He said the contract was not read over to him. "He, (Reed) told me there was something, only a piece of paper wrote up that I was giving, that he was going to let me have that \$50 upon my own name there, and any time I got ready to sell the corn, if I raised a crop of corn, that I would haul him all the corn I had to sell at the same price." He swears that he made his mark simply by touching his hand to the end of the penholder held by Reed, who represented that the instrument he was executing was an agreement to be charged with \$52.50, and to deliver sufficient corn to balance the account, and as much additional as he could spare if he had a good crop. Ward claimed further that he never agreed to sell three thousand bushels.

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Reed testifies that he read the contract to Ward as written, and his father, George Reed, who was present, corroborates this testimony.

The record discloses that Ward was an ignorant, unlettered man, able neither to read nor write, and that he was partially deaf. The rule is well settled that if a person is deceived as to the contents of a written instrument, and is induced by fraudulent representations to affix his signature to a contract, under the belief that it correctly sets out the agreement to which he has orally assented, parol evidence is admissible to show what the contract actually was. It was the duty of Reed, acting for plaintiffs in error, to reduce to writing the contract actually made, and the burden was upon plaintiffs in error to show by a preponderance of the evidence that Ward understood the nature of the writing signed by him. In the case of *Seldon v. Myers*, 20 How. [U. S.], 506 [Lawyer's Edition, Book 15, page 976], Chief Justice Taney says: "Where one is dealing with an unlettered man, who can neither read nor write and makes his mark to the instruments he executed, it is incumbent on the former to show, past doubt, that the latter fully understood the object and import of the writings which he executed." While this court is not prepared to go as far as the learned chief justice in the opinion quoted, yet it is well settled that where one deals with an unlettered man, who can neither read nor write, and who makes his mark to the instrument he executes, and there is testimony to show that he did not understand the contents of the paper he has executed, or that his signature was obtained by fraud, it is incumbent on the former to show by a preponderance of the evidence, that the latter fully understood the object and import of the writing which he executed.

It is contended that Ward is bound by the contract which he signed, because it was read over to him as shown by Reed's testimony, and that if he carelessly and negligently affixed his signature, he can not now be heard to question it. The rule is not applicable to the case at bar.

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In the opinion of this court filed in the former appeal of this case, it is said: "The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing, is not applicable in a suit thereon between the original parties thereto, where the defense is that such writing, by reason of fraud, does not embrace the contract actually made."

*Ward v. Spelts*, 39 Neb., 809. See also *State Insurance Co. v. Jordan*, 29 Neb., 514. From an examination of the entire record we are satisfied that the jury were amply justified in finding that the contract actually entered into was as shown by the testimony of Ward.

In *Sonnenschein v. Bartels*, 37 Neb., 592, the rule is correctly announced in the following language: "When a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding can not be disturbed by the supreme court." *Davis v. Hilbourn*, 41 Neb., 35.

Instruction No. 7, given on the court's own motion, is as follows:

"If you find from the evidence that the defendant, at the time of executing the paper in evidence, was unable to read or write or read written or printed matter, and that '3,000 bushels' was placed in the writing without the knowledge of the defendant, and that he was induced to sign said contract believing said contract embraced the agreement made between the plaintiffs and the defendant; and if you further find that the plaintiffs at the time paid to the defendant the sum of \$52.50, and that the agreement between the parties was that the defendant should deliver to the plaintiffs sufficient corn to repay said money at the price named, and that the defendant should, if he had any other corn to spare, sell the same to the plaintiffs at the same price, said corn to be delivered in the month of August, 1890, after the defendant could tell whether or not he would raise a good crop of corn for that year, and

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after he should ascertain whether or not he would have any more corn to sell and spare from his then old crop on hand; and did not agree to sell the plaintiffs' 3,000 bushels of corn or any other specific quantity or amount of corn over and above sufficient to pay the \$52.50 advanced by the plaintiffs to the defendant, and if you further find that the paper signed by the defendant was not read to the defendant as the same actually was when signed by him, but was represented to the defendant as not containing the clause requiring him to deliver 3,000 bushels of corn to the plaintiffs, and that the defendant, believing such representation, executed the same, then you should find for the defendant."

Counsel contend that this instruction is erroneous in that it submits an issue whether the contract in suit was correctly read to defendant, whereas the only issue made by the proof is whether the contract was read at all or not. It is true, that J. W. R. and George Reed claim that the contract was correctly read to Ward, while the latter contends that nothing was read to him at all, but that he was led to believe that he was signing a memorandum, receipting for \$52.50, and agreeing to deliver sufficient corn to balance the account thus made. An examination of this entire instruction, as well as the other instructions given, shows that the real issue submitted was what was the actual agreement between the parties. The issue of fraud was squarely raised by defendant's pleading and proof. The material inquiry was whether defendant was induced by misrepresentations to sign an agreement which did not embody his understanding of the contract. His illiteracy and physical infirmity made him the easy victim of fraud. His understanding, as shown by the evidence, was that the instrument he executed was a receipt for the money advanced and an agreement to deliver sufficient corn to balance the account, and as much more as he could spare when he should know the condition of his crop. This theory of the case was fairly presented by the instruction complained of. "A party to an action is en-

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titled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer*, 55 Neb., 389.

That portion of the instruction of which counsel complain is as follows: "And if you further find that the paper signed by the defendant was not read to the defendant as the same actually was when signed by him, but was represented to the defendant as not containing the clause requiring him to deliver 3,000 bushels," etc. It is not probable that the jury were diverted by this clause in the instruction from the real inquiry, namely, whether the defendant believed and acted upon representations that the instrument which he was executing contained an agreement to deliver any specific number of bushels in addition to that necessary to repay the money advanced. The instruction submits the question, "was the contract read as it was, or, was it represented as not containing an agreement to deliver 3,000 bushels?" This statement of the issue, when taken in connection with all the other instructions, was substantially correct, and plaintiffs in error were not prejudiced thereby. In *Hoffine v. Ewings*, 60 Neb., 729, it is said: "Instructions are to be considered together, to the end that they may be properly understood, and when so construed, if, as a whole, they fairly state the law, applicable to the evidence, error can not be predicated upon the giving of the same."

The case seems to have been fairly submitted to the jury, and we are unable to say that their verdict is not right. It is, therefore, recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

Pope v. Kingman & Co.

ISHAM B. POPE V. KINGMAN & COMPANY.

FILED DECEMBER 18, 1901. No. 10,493.

Commissioner's opinion. Department No. 2.

1. **Garnishment: PREPAYMENT OF FEES.** A garnishee who appears and answers without objection waives his right to prepayment of his fees.
2. **Garnishment: UNSATISFACTORY ANSWER: EXECUTION AGAINST DEBTOR.** Issuance of execution against the attachment debtor and return thereof unsatisfied are not required before proceeding against a garnishee under section 225, Code of Civil Procedure, for unsatisfactory answer.
3. **Fraudulent Conveyances: BONA FIDES: INSTRUCTION.** A transfer made to a third person for the sole purpose of preferring and satisfying a *bona fide* creditor is not voidable as hindering or delaying other creditors. But such transfer must be made in good faith for that purpose, and an instruction which omits this element of the rule is properly refused.
4. **Fraudulent Conveyances: PARTICIPATION OF DEBTOR AND CREDITOR IN INTENT: APPLICATION TO PURCHASER.** The rule that where a *bona fide* creditor takes property of the debtor in satisfaction of his claim the transaction is not voidable by reason of fraudulent intent of the debtor unless the creditor participated in such intent, does not apply to a purchaser, not himself a creditor, who, by direction of the debtor, pays the purchase price to a preferred creditor.
5. **Appeal and Error: EXCEPTIONS.** Alleged errors in the introduction of evidence are not reviewable unless excepted to in the trial court.
6. **Appeal and Error: VERDICT: CORRECTNESS OF.** The verdict *held* to be sustained by the evidence and in accord with the instructions of the court.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

*Hazlett & Jack*, for plaintiff in error.

*James H. McIntosh*, contra.

POUND, C.

Kingman & Company sued Pope under section 225, Code of Civil Procedure, alleging an unsatisfactory disclosure

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as garnishee in an action brought by Kingman & Company against one Hiatt. The substantial issue involved was as to the validity of a transfer of a stock of goods from Hiatt to Pope, which was claimed to be fraudulent and void as to Hiatt's creditors. The verdict of the jury was for plaintiffs and the cause comes here on error from the judgment pursuant thereto.

It is urged that the action is not maintainable because Pope was neither paid nor tendered the fees to which he was entitled as garnishee and also because no execution was issued and returned unsatisfied prior to its commencement. With respect to the first contention, it is enough to say that the garnishee appeared and answered without objection, and by so doing waived his right to prepayment of fees. *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn., 55. Nor is the other point well taken. This was a case of garnishment before judgment. Section 225, Code of Civil Procedure, under which the action was brought, does not require issuance of execution and return thereof unsatisfied prior to suit, and such a requirement, if read into the statute, would be in conflict with the provision of section 228 that the amount recovered from the garnishee shall be first applied upon the judgment and that execution shall issue for the residue. We are satisfied that the action is maintainable without such preliminary proceeding. It is also argued that the petition does not state a cause of action in that it fails to show sufficiently that the judgment against Hiatt is unpaid. Bearing in mind that the petition is thus attacked for the first time after verdict, the allegation that plaintiff is "unable to collect its said judgment" would seem to be enough.

With one exception, we think all of the instructions requested by Pope and refused by the trial court relate to matters amply covered in the charge of the court on its own motion. The one instruction tendered of which this may not be said refers to the right of an insolvent debtor to prefer creditors. It was claimed that Hiatt made the transfer to Pope for the purpose of preferring



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his wife and daughter, to whom he testified he was largely indebted, and that the consideration went to them by Hiatt's direction. We do not doubt that if a debtor sells his property with the sole and *bona fide* purpose of raising money to pay creditors and does apply the money and all of it to payment of creditors in good faith, the transfer is valid. Preferring a creditor in good faith is a legal right of the debtor, and he may do so quite as much by selling his goods and paying over the proceeds as by turning over the goods themselves. If he sold for that purpose only, he had no fraudulent intent and the sale was valid. Hence, although the court made it clear that the sale was valid unless made with the intent and purpose of defrauding creditors, we think an instruction as to the right of a debtor to prefer creditors would have been very proper and that it should have been given had one been tendered which correctly stated the law. But the instruction requested, refusal of which is assigned as error, is obviously defective and improper in omitting the important qualification that the preference must be made in good faith. If the debtor intends not only to prefer one creditor, but to hinder, delay and defraud the others, the transfer is invalid. *Ellis v. Musselman*, 61 Neb., 262, 85 N. W. Rep., 75; *Tackaberry v. Gilmore*, 57 Neb., 450, 452; *Landauer v. Mack*, 43 Neb., 430, 436. Though preference of itself does not amount to nor give rise to an inference of such intent, neither does it necessarily exclude it. The instruction was properly refused.

In the course of an instruction which clearly and fully states what the plaintiffs were required to prove the court told the jury that if notice of the fraudulent intent of Hiatt, if any he had, was brought home to Pope before he passed the consideration the sale was voidable. Two objections are made to this part of the instruction. First it is said that as the purpose of the sale was to prefer Hiatt's wife and daughter who were creditors, the vendee would not be liable merely because of notice of any fraudulent intent Hiatt may have had, nor unless he partici-



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pated therein. If the wife and daughter had taken the property in satisfaction of *bona fide* claims, even if there had been a fraudulent intent and they had known of it, yet taking under a species of compulsion to secure or satisfy their just claims, they could have held the property without regard to notice unless they participated in some way in the fraudulent purpose. *Jones v. Loree*, 37 Neb., 816; *Sunday Creek Coal Co. v. Burnham*, 52 Neb., 364. But Pope was a mere volunteer. He was under no species of compulsion to buy the stock, and, if there was a fraudulent intent, and he knew it, cannot avail himself of the fact that those who received the consideration may not be compelled to restore it. That he paid the purchase price to preferred creditors by direction of the debtor does not put him in the place of such creditors. The rule that protects a creditor who takes in satisfaction of a *bona fide* indebtedness is expressly put on the ground that any other doctrine would prevent him from protecting himself and from exercising his legal right of demanding and receiving the money due him. So long as he only exercises this right, and does not participate in any fraudulent intention which the debtor may have, it may well be said that he is not within the purview of a statute meant to protect creditors, not to defeat them. But ordinary purchasers, even though they pay a full consideration, are within the express words of the statute where they have knowledge of the fraudulent intent of the vendor. Section 21, chapter 32, Compiled Statutes. Moreover, the reason of the rule as to creditors does not apply to them. The statute contains but one exception, namely, the case of a purchaser for value without notice, and there seems no ground for establishing further exceptions by supplementary judicial legislation. The rule applicable in this case is stated in *Brown v. Sloan*, 61 Neb., 237, 85 N. W. Rep., 37. Next it is urged that the evidence affords no ground for such an instruction. There is evidence that the transfer of an equity in lands in another state, which was the consideration, was not

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completed for some time after the stock of goods was turned over. It is true Pope claimed that he made the transfer for his wife and turned the stock over to her at once "by indorsement of the bill of sale." But plaintiffs contended that this was part of a fraudulent scheme, and had a right to have the general rule of law as to notice stated to the jury. The instruction is a full and correct statement of what was required to be shown before recovery could be had and we see no valid objection to it.

Errors are assigned with respect to the admission of certain notes in evidence. But the record does not show any exceptions to these rulings, and we cannot review them. It is also argued that the verdict is contrary to the evidence and to the court's instructions. Questions of fraudulent intent are peculiarly within the province of a jury. *Connelly v. Edgerton*, 22 Neb., 84. The transactions here in controversy were largely between near relatives and called for close scrutiny. There was ample evidence to go to the jury, and we should not be justified in disturbing their conclusion even if we were inclined to take a different view. But we think the verdict is sustained by the evidence and in accord with the instructions.

It is recommended that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

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JOSEPH A. CONNOR V. SCHREINER-FLACK GRAIN COMPANY.

FILED DECEMBER 18, 1901. No. 10,623.

Commissioner's opinion. Department No. 2.

**Appeal and Error: NO BILL OF EXCEPTIONS: INSTRUCTIONS.** When a case is brought to this court by petition in error and there is no bill of exceptions in the record, instructions given by the trial court that might have been proper under any possible condition of the evidence under the pleadings will not be held erroneous and prejudicial.

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ERROR from the district court for Douglas county.  
Tried below before BAKER, J. *Affirmed.*

*Duffie & Van Dusen*, for plaintiff in error.

*W. D. McHugh*, *contra.*

SEDGWICK, C.

In this action the plaintiff alleged in its petition in the district court that it made with the defendant a contract for the purchase of the defendant of a quantity of corn; which contract was afterwards extended and modified, and finally, in consideration of the cancellation of the contract, the defendant agreed to pay the plaintiff the sum of \$625. The answer of the defendant is in substance that the contract for the sale and purchase of the corn was a gambling contract, as it was not intended that any corn should be delivered under it but merely that margins should be paid; and also set up a counter-claim for sums already paid thereon. It was tried with a jury and verdict for plaintiff and brought here by defendant upon petition in error.

There is no bill of exceptions in the record. The plaintiff in error admits that there was sufficient evidence to warrant the jury in finding the verdict they did; and says in his brief that it does not complain "that any one particular instruction" is not warranted by the evidence. The complaint is, that the instructions gave "undue prominence to one feature of the case, and that this unduly influenced the jury," and this is the sole question raised. There were sixteen several instructions given by the court to the jury; five of these are complained of as giving undue prominence to one feature of the case. They are too lengthy to quote here, but they manifestly come within the well established rule of this court that all presumptions are in favor of the regularity of the proceedings of the district court. And when a case is presented in this court upon the transcript alone without a

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bill of exceptions, instructions given to the trial jury by the district court will be presumed to be correct unless they misstate the law and contain propositions which could not be held correct in any possible case made by the proof under the pleadings. *Willis v. State*, 27 Neb., 98; *Oltmanns v. Findlay*, 47 Neb., 289. And we cannot say from this record that there was any error in these instructions which was prejudicial to the rights of the plaintiff in error. It might be added that each of these instructions appears to present some particular phase of the case which may or may not have been covered by the evidence.

It is recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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WILLIAM L. MATSON ET AL., APPELLEES, v. A. L. EMERSON,  
APPELLANT, ET AL.

FILED DECEMBER 18, 1901. No. 10,638.

Commissioner's opinion. Department No. 3.

APPEAL from the district court for Lancaster county.  
Tried below before CORNISH, J. *Appeal dismissed.*

*S. B. Pound and Roscoe Pound*, for appellant.

*J. W. Deweese, F. I. Foss and F. E. Bishop*, contra.

AMES, C.

This is an appeal from a money judgment rendered by the district court for Lancaster county. Pending the appeal, the appellant has been adjudged a bankrupt, the judgment appealed from has been proved and allowed against his estate in the bankruptcy court, and he has been discharged. There is, therefore, no subject-matter for litigation before this court. If there was such a sub-

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ject-matter a necessary party to the disposition of it is absent. The presence of the trustee in bankruptcy would be indispensable. *Know v. Exchange Bank*, 12 Wall. [U. S.], at page 381; *Herndon v. Howard*, 9 Wall. [U. S.], 664; *Jenkins v. Greenbaum*, 95 Ill., 11. An adjudication in his absence would not be obligatory upon him and would affect no pecuniary right or interest of the appellant.

It is recommended that the appeal be dismissed.

DUFFIE and ALBERT, CC., concur.

APPEAL DISMISSED.

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CLARKSON SAW MILL COMPANY V. A. L. PATRICK.

FILED DECEMBER 18, 1901. No. 10,669.

Commissioner's opinion. Department No. 1.

**Appeal and Error: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* to support the verdict and judgment.

APPEAL from the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

*Warren Switzler*, for plaintiff in error.

*Duffie & Van Dusen*, contra.

DAY, C.

The Clarkson Saw Mill Company commenced this action in the district court for Douglas county against A. L. Patrick to recover a balance alleged to be due upon an accepted draft drawn by the plaintiff and accepted by the defendant. The draft was for the sum of \$635, upon which there had been a payment of \$135.

The answer admitted the acceptance of the draft and the payment of \$135 as alleged in the petition, but by way of defense charged that on October 23, 1894, the

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defendant executed and delivered to the plaintiff his promissory note for \$500, due three years after date, secured by a mortgage upon real estate, and that the same were accepted by the plaintiff in full satisfaction and payment of the debt sued upon. The reply was a general denial. The trial resulted in a verdict in favor of the defendant upon which judgment was rendered, to review which the plaintiff has brought the case to this court on error.

The principal error complained of is that the verdict is not sustained by sufficient evidence and is contrary to law. The evidence discloses that in October, 1894, the defendant was financially embarrassed and unable to pay his creditors, some of whom were pressing him for payment of their claims. On October 23, 1894, in order to avoid threatened litigation, and seemingly prompted by the best of motives, he attempted to make an adjustment with a number of his creditors, by executing to them notes and giving security and thus securing for himself an extension of the time of payment. Among others, he executed a note in favor of the plaintiff for \$500, due and payable October 23, 1897, secured by a second mortgage upon real estate situated in the city of Omaha, and delivered the same to Rich & Sears, a firm of attorneys who had other claims in their hands against the defendant for the purpose of obtaining security. These attorneys notified the plaintiff by wire that their claim had been secured by a real estate mortgage and requested the plaintiff to ratify their action. The plaintiff replied to this communication that its matters were wholly in the hands of Mr. Cady and to advise with him. A conference was had between the attorneys and Mr. Cady with reference to the security, and while the security was not considered sufficient for some reason, as the witness expressed it, "the matter was rather left hanging in the air and the papers left in my possession."

On November 19, 1894, Rich & Sears sent the mortgage to the plaintiff and suggested that the plaintiff execute

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a release to Patrick, and also made the suggestion that if it continued to hold the mortgage unreleased, that Patrick might insist that the note and mortgage were accepted in payment of the claim. In response to this letter the plaintiff replied as follows: "Your favor of the 19th inclosing mortgage which you ask us to release received and both have been referred to Mr. H. C. Cady of your place who is our agent in the matter. You may confer with him and see what he cares to do about executing release." The record also shows that some months afterwards, Cady informed the defendant that he proposed to hold the mortgage for what it was worth.

While the testimony offered was not clear and direct that the plaintiff had accepted the note in full settlement of the debt represented by the acceptance, there was, in our opinion, sufficient to warrant the jury in so finding. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,  
LESSEE OF THE GRAND ISLAND & WYOMING CENTRAL  
RAILROAD COMPANY, APPELLEE, v. HOWARD LOMAX,  
COUNTY TREASURER OF CUSTER COUNTY, APPELLANT.

FILED DECEMBER 18, 1901. No. 10,692.

Commissioner's opinion. Department No. 3.

APPEAL from the district court for Custer county.  
Tried below before SULLIVAN, J. *Affirmed.*

*J. R. Dean and L. E. Kirkpatrick, for appellant.*

*J. W. Deweese, F. E. Bishop, Jno. S. Kirkpatrick and  
N. K. Griggs, contra.*

AMES, C.

This cause was submitted on briefs without oral argument. There is no contention in the briefs concerning

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any matter touching the merits of the controversy that was not considered and disposed of in *Custer County v. Chicago, B. & Q. R. Co.*, 62 Neb., 657, 87 N. W. Rep., 341. Under the authority of that decision it is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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DAVID S. GRAY ET AL., APPELLEES, v. WILHELMINA EURICH,  
APPELLANT, IMPLEADED WITH HENRY EURICH ET AL.

FILED DECEMBER 18, 1901. No. 10,702.

Commissioner's opinion. Department No. 2.

1. **Judicial Sales: OBJECTIONS TO CONFIRMATION: WHEN MADE.** Objections to confirmation of a sale except for fraud will not be considered where they go to the appraisement only and were not raised before sale.
2. **Appeal and Error: CONFIRMATION OF SALE: NON-PREJUDICIAL OBJECTIONS.** An order confirming a sale will not be reversed for technical irregularities which could not have been prejudicial to substantial rights of any of the parties.

APPEAL from the district court for Thayer county.  
Tried below before HASTINGS, J. *Affirmed.*

*M. H. Weiss and Frank Irvine*, for appellant.

*Richards & Dinsmore*, contra.

POUND, C.

The principal objection to the sale proceedings appealed from in this case is not available on appeal for the reason that it goes to the appraisement and was not raised before sale. An ingenious argument has been presented, but it seems clear enough that the alleged failure to appraise the interest of all the defendants having an estate in the lands cannot be distinguished from the many other defects in appraisements to which the rule that they must be pointed out by objections thereto be-



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fore sale has been applied. Another objection raises the same question as that considered, and passed on adversely to the contention of appellants, in *Tootle, Lemon & Co. v. Wiley*, 1 Neb. [Unof.], 711, and requires no further comment. Some irregularities in the notice of sale are also complained of. Thus, the notice recites that the land has been "levied" upon under a "judgment" rendered before a judge named. Counsel contend that the words levy and judgment indicate an execution sale, and that the naming of the judge indicates an order made at chambers. But the notice also recites that the "levy" mentioned was made "by virtue of an order of sale." Under our Code "judgment" is the apt word in proceedings of an equitable nature as well as in those which are strictly legal. The recital of an order of sale must have corrected any misapprehension to which the word "levy" might have given rise, and as the judgment was rendered "before" the judge named, not "by" him, as if he had acted at chambers, we fail to perceive how any prejudice could have resulted from the form of the notice. It must be admitted that the form used is not to be recommended, and that more care in drawing it would not have been amiss. But an order confirming a sale will not be reversed for technical irregularities which could not have been prejudicial to substantial rights of any of the parties.

We recommend that the order appealed from be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

*Gray v. Naiman.*

DAVID S. GRAY ET AL., APPELLEES, V. JOHN NAIMAN, JR.,  
ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,703.

Commissioner's opinion. Department No. 2.

1. **Judicial Sales: OBJECTIONS TO CONFIRMATION: WHEN MADE.** Objections to confirmation of a sale will not be considered except for fraud where they go to the appraisement only and were not raised before sale. *Gray v. Eurich, ante*, page 194, followed.
2. **Appeal and Error: CONFIRMATION OF SALE: NON-PREJUDICIAL OBJECTIONS.** An order confirming a sale will not be reversed for technical irregularities which could not have been prejudicial to substantial rights of any of the parties. *Gray v. Eurich, ante*, page 194, followed.

APPEAL from the district court for Thayer county.  
Tried below before HASTINGS, J. *Affirmed.*

*M. H. Weiss and Frank Irvine, for appellants.*

*Richards & Dinsmore, contra.*

OLDHAM, C.

This is an appeal from a confirmation of a judicial sale. The identical objections urged against the regularity of the sale are determined in the case of *Gray v. Eurich, ante*, page 194, and for the reasons set forth in that opinion, we recommend that the order appealed from be affirmed.

SEDGWICK and POUND, CC., concur.

**AFFIRMED.**

Seaman v. Atkinson.

**A. J. SEAMAN, APPELLEE, V. A. ATKINSON ET AL., IM-  
PLEADED WITH WILLIAM ROBINSON, APPELLEE, AND  
ELIJAH B. NICHOLSON, APPELLANT.**

FILED DECEMBER 18, 1901. No. 10,729.

Commissioner's opinion. Department No. 2.

**Appeal and Error: ORDER OVERRULING MOTION.** When the defendant in an action to foreclose a tax lien files no pleading in the district court except a motion to strike plaintiff's petition from the files, the action of the trial court in overruling such motion can not be reviewed on appeal.

APPEAL from the district court for Sarpy county.  
Tried below before KEYSOR, J. *Affirmed.*

*Lefler & Winters*, for appellant.

*C. L. Hover*, contra.

OLDHAM, C.

This was an action to foreclose certain tax liens. There were a number of defendants to the action in the court below. There was judgment for the plaintiff and but one of the defendants, Elijah B. Nicholson, has brought the case here for review on appeal. The only pleading filed by appellant, Nicholson, in the court below, was a motion to strike plaintiff's amended petition from the files. This motion was overruled and the appellant filed no further pleading. This record then brings no issue before us which was tendered in the trial court that can be reviewed on appeal and the petition shows on its face a good cause of action.

We therefore recommend that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

**AFFIRMED.**

Union Ins. Co. v. McCullough.

THE UNION INSURANCE COMPANY OF LINCOLN, NEBRASKA,  
v. ELIZA McCULLOUGH.

. FILED DECEMBER 18, 1901. No. 10,732.

Commissioner's opinion. Department No. 3.

1. **Right of Person Signing Application With Insured to Interest in Policy.** The fact that the husband of a married woman signs with her an application for insurance on her separate property, does not invest him with any right or interest in the policy issued on such application, and in which the woman alone is named as the insured.
2. **Insurance: "VACANCY" CLAUSE: CHANGE OF TENANTS.** Where, in an application for insurance, the premises are described as in possession of a tenant, a provision in the policy that it should become void if the premises became vacant or unoccupied is not violated by such a vacancy as is occasioned by the removal of the tenant in possession to allow the entry of another tenant.
3. **Insurance: WHEN BURNING BY THIRD PARTY NOT A DEFENSE.** That an insured building was burned by a third party is no defense to an action on the policy, in the absence of a showing that the party insured was privy to such burning.

ERROR from the district court for Dawson county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Hamer & Hamer*, for plaintiff in error.

On the theory that the husband of the insured was the agent of his wife and for that reason the insured was responsible for and *particeps criminis* in the acts of her agent and could not recover on the policy, the plaintiff in error cited the following cases: *Wilson v. Beardsley*, 20 Neb., 449; *Oberne v. Burke*, 30 Neb., 581; *Creighton v. Finlayson*, 46 Neb., 457; *Brown v. Eno*, 48 Neb., 538; *McKeighan v. Hopkins*, 19 Neb., 33; *Joslin v. Miller*, 14 Neb., 91; *Elwell v. Chamberlin*, 31 N. Y., 611; *National Exchange Co. v. Drew*, 32 Eng. Law & Eq., 1; *New England Mortgage Security Co. v. Hendrickson*, 13 Neb., 575; *First National Bank of Cedar Rapids v. Erickson*, 20 Neb., 580; *Cogswell v. Griffith*, 23 Neb., 334; 2 Pomeroy, Equity, section 1053; *Hammond v. Pennock*, 61 N. Y., 145; *Bingham v. Bing-*

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*Ham*, 1 Ves. Sr. [Eng.], 126; *Fulton v. Whitney*, 5 Hun. [N. Y.], 16.

*H. M. Sinclair and Geo. C. Gillan, contra.*

When property is vacated by one tenant and another is about to move in at the time of the fire the vacancy is not such a one as will permit the defendant to avoid the policy. *Liverpool & London & Globe Insurance Co. v. Buckstaff*, 38 Neb., 146; *German Insurance Co. of Freeport v. Davis*, 40 Neb., 700; *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis., 269; *Whitney v. Black River Ins. Co.*, 72 N. Y., 118; *Stupetzki v. Trans-Atlantic Fire Ins. Co.*, 43 Mich., 373.

Conceding for the moment that the husband did set fire to these buildings, this act of the husband would not destroy the right of the wife to enforce the policy. *Feibelman v. Manchester Fire Assurance Co.*, 108 Ala., 180, 19 So. Rep., 540; *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. Rep., 47; *Perry v. Mechanics Mutual Ins. Co.*, 11 Fed. Rep., 485; *Midland Ins. Co. v. Smith*, 6 Q. B. Div., 561; *Westchester Fire Ins. Co. v. Foster*, 90 Ill., 121; *Walker v. Phoenix Ins. Co.*, 62 Mo. App., 209; *Henderson v. Western Marine and Fire Ins. Co.*, 10 Rob. [La.], 164, 43 Am. Dec., 176; *Karow v. Continental Ins. Co.*, 57 Wis., 56, 46 Am. Rep., 17; *Hartford Fire Ins. Co. v. Williams*, 63 Fed. Rep., 925.

DUFFIE, C.

May 22, 1897, the plaintiff in error issued to Eliza McCullough, the defendant in error, a membership certificate insuring against loss or damage by fire, lightning, cyclones, tornadoes and windstorms, to the amount of \$1,700 for the term of five years, certain farm buildings in the county of Dawson. March 4, 1898, certain of the buildings insured were destroyed by fire, and this action was commenced to recover for the loss. Among other matters alleged in the answer filed by the company, was one

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to the effect that at the time of the fire, the buildings were vacant, in violation of the terms and conditions of the policy, and it was further alleged that the application for the insurance was signed by Eliza McCullough and Hugh McCullough, her husband, and that any loss that might arise would go to their joint benefit; that Hugh McCullough, the husband, set fire to the buildings and caused them to be burned. A verdict was returned for the plaintiff, judgment in her favor entered thereon, and the defendant company has brought the record here for review.

It would be useless to spend any time in a discussion of the defense attempted by the company to the effect that the plaintiff and her husband joined in the application for insurance; that the loss, if paid, would go to their joint benefit, and that the fire was caused by the husband. It is not disputed that the legal title to the property insured stood in the name of Eliza McCullough, and that the husband had no interest therein, save such as the law gives to the husband in the property of his wife. The contract of insurance was with Mrs. McCullough alone. There is no evidence to show that Mrs. McCullough knew anything of the alleged acts of her husband in causing the fire, if he did cause it, and law, reason and justice all combine in declaring that her rights should not be affected by his wrongful acts, of which she had no knowledge.

Complaint is made that the court erred in its statement of the issues to the jury. In its fifth instruction it said to the jury: "The loss as pleaded in the petition is admitted by the defendant company, and the amount of insurance upon the buildings destroyed as claimed in the petition is also admitted. So that the only issue in the case for you to determine, is whether or not the premises were vacant at the time of the loss." It is said that this is misleading, inasmuch as there was no dispute that the buildings were actually vacant at the time of the fire, and the plaintiff in her reply for the purpose of

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avoiding that defense, had set up an adjustment of the loss by the general manager of the company, who at the time of making such adjustment had notice that the buildings were vacant. The plaintiff did not occupy the premises herself, and at the time the policy was issued to her, they were in possession of one Radcliff as her tenant. A day, or perhaps two days prior to the fire, he had moved out, and one Briner, to whom plaintiff had rented the premises for that year, was about to take possession and had, in fact, moved some of his property to the premises. Relating to this condition of affairs, the court in its sixth instruction said: "The plaintiff in her application for insurance declared to the company that the premises were occupied by her tenant, and the company knowing that this was the nature of the possession were bound to know that this tenancy was likely to change, and in this case if you find from the evidence that the vacancy at the time of the fire was the result of, or existed only because of a change of tenants, and the period of time during which the house had not been occupied by either of the families, was not an unreasonable period under the circumstances, and that the incoming tenant had, before the loss, moved his farm implements, grain, feed and farm animals on to the premises where he was caring for the same at the time of the loss, and if he contemplated moving into the house with his family, then such vacancy was only temporary, and was not such a vacancy as to make the policy void, and you should find for the plaintiff." This instruction was warranted by the evidence in the case and announced a correct rule of law.

In *Liverpool & London & Globe Insurance Company v. Buckstaff*, 38 Neb., 146, it was said that: "A policy of insurance provided that it should be void if the premises became vacant or unoccupied without the written consent of the company should be indorsed. The tenant occupying the insured building partially moved out the day before the fire, leaving in the building a portion of his furniture. *Held*, That the premises were not

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vacant or unoccupied within the meaning of the policy." In that case the court quoted with approval from *Hotchkiss v. Phoenix Insurance Company*, 76 Wis., 269, as follows: "Under certain circumstances premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insure it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases; in *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn., at page 561; *Whitney v. Black River Insurance Co.*, 9 Hun [N. Y.], 37; 1 Wood, Insurance [2d ed.], section 91, pp. 208-210, and cases cited." In this view of the case, we do not think that there was any error on the part of the court in stating to the jury that the issue they were to try was whether the premises were vacant or not.

Complaint is also made of the allowance of an attorney's fee under the provisions of section 45, chapter 43 of the Compiled Statutes, and we are asked to again examine the statute and to declare it unconstitutional. This identical question has been presented to the court and determined against the contention of the plaintiff in error in the following cases: *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828; *Insurance Co. of North America v. Bachler*, 44 Neb., 549; *Lancashire Ins. Co. v. Bush*, 60 Neb., 116; and we do not believe a further discussion



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of the question would either serve to interest the profession or to give any additional light upon the subject. We are content with the former decisions of this court, and the holding that no constitutional provision is violated in a classification of subjects for legislative action. We are unable to discover any reversible error in the record, and therefore recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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THE UNION INSURANCE COMPANY OF LINCOLN, NEBRASKA,  
v. ELIZA McCULLOUGH.

FILED JULY 22, 1902. No. 10,732.

Commissioner's opinion. Department No. 3.

REHEARING of case reported *ante*, page 198.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Former opinion adhered to.*

*Hamer & Hamer*, for plaintiff in error.

*Geo. C. Gillan and H. M. Sinclair*, contra.

DUFFIE, C.

A rehearing was granted in this case on motion of the plaintiff in error and the case has been again argued and additional briefs filed. A careful re-examination and consideration of the case convinces us that there was no error in the judgment entered or in the proceedings lead-

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ing up thereto. We think that the former opinion should be adhered to and so recommend.

AMES and ALBERT, CC., concur.

The judgment of the district court is affirmed.

AFFIRMED.

NOTE.—September 22, 1902, a writ of error to the supreme court of the United States was allowed the plaintiff in error in the above reported cause, the record showing that the constitutionality of section 3, chapter 48 of the Laws of Nebraska of 1889, section 45, chapter 43 of the Compiled Statutes, was drawn in question. The plaintiff in error claims that said statute violates the 14th amendment to the constitution of the United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." —REPORTER.

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THE CITY OF LINCOLN V. ANNIS MILLER MAYS, ADMINISTRATRIX OF THE ESTATE OF NEHEMIAH P. MILLER, DECEASED.

FILED DECEMBER 18, 1901. No. 10,737.

Commissioner's opinion. Department No. 1.

1. **Notice of Injury on Sidewalk:** DESCRIPTION OF LOCATION. Notice that an injury occurred on the sidewalk along the east side of block 54, between two named streets, is, in the absence of any demand for more definite location, a sufficient location of the place in a notice to the city under section 36, article 1 of chapter 13a, Compiled Statutes, 1897.
2. **Presumption of Notice From Condition of Walk:** SUBMISSION TO JURY. Evidence *held* sufficient to warrant submission to the jury of question whether the defects in the sidewalk were so obvious and of so long continuance as to warrant presumption of notice.
3. **Appeal and Error:** INSTRUCTIONS: QUESTION SUBMITTED. Instructions as a whole *held* to properly submit this question.
4. **Instruction on Notice.** Instruction that notice to "any of the municipal authorities" was sufficient, and not prejudicial, where no evidence was introduced or tendered of notice to any but the street commissioner and the sidewalk inspector, and jury were cautioned to find no notice except as shown by the evidence.

ERROR from the district court for Lancaster county. Tried below before HOLMES, J. *Affirmed.*

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*J. R. Webster, John P. Maule and D. J. Flaherty*, for plaintiff in error.

*Strode & Strode, contra.*

HASTINGS, C.

Action to recover for injuries sustained by a fall upon a sidewalk. From a verdict and judgment for plaintiff, the defendant, city of Lincoln, brings error, and complains, first, that the necessary claim under section 36, of the city charter, was never filed in the office of the city clerk; second, that the court erred in instructing the jury that if the defect in the walk had existed such length of time that the city in the exercise of reasonable care might have had notice of it, notice should be presumed. It is further claimed that the court erred in assuming in its instructions and telling the jury that notice to "any of the municipal authorities" was sufficient.

The last clause of the section of the city charter in question is as follows: "To maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk within three months from the time such right of action accrued, a statement, giving full name, and time, place, nature, circumstance, and cause of the injury or damage complained of." This provision of the charter is held in *City of Lincoln v. Grant*, 38 Neb., 369, to be in the nature of a condition precedent to the right to prosecute an action for damages, and statement of compliance with it necessary to show a cause of action. In this case, it was sought to be complied with by means of the following notice:

"To the Honorable Mayor and Council of the City of Lincoln:

"The city of Lincoln, To Nehemiah P. Miller, Dr. \$5,000. Nehemiah P. Miller, claimant herein, represents unto the Honorable Mayor and Council of the city of Lincoln, Nebraska, that on or about the 7th day of May, 1897, claimant, while exercising all reasonable care

and caution, and without fault on his part, fell on the sidewalk in the city of Lincoln, on the east side of 9th street, between N and O streets, being on the west side of block 54, and received severe and dangerous injuries to his right arm and shoulder and right side; that the sidewalk at the place where claimant fell and received injuries was in an unsafe and dangerous condition. Claimant says that he has suffered injury by reason of said injuries so received in the amount of \$5,000, and hereby presents his claim against the city of Lincoln and asks that it be allowed."

Plaintiff claims that this was amply sufficient so far as the place is concerned under the decisions of this court. *City of Lincoln v. O'Brien*, 56 Neb., 761, and *City of Lincoln v. Pirner*, 59 Neb., 634, 81 N. W. Rep., 846. In the former case, there is an extensive review of the decisions of other states in reference to the precision required in such a notice, and in that case the conclusion was reached that an allegation that the injury occurred by stepping in a hole in the sidewalk on the north side of Q street between 18th and 20th streets, was sufficiently definite since it nowhere appeared in the evidence that there was more than one hole along such sidewalk. In the latter case, a statement that the accident occurred "in front of lot 13, in block 45, on P street, in the city of Lincoln, near the west side of what is commonly known as the 'Carr Block,'" was held sufficient, notwithstanding an error in the number of the block, which should have been 34, instead of 45. It is stated that the rule of construction to be deduced from the adjudged cases is that "if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident occurred, there is a substantial compliance with the law." In that case the "Carr Block" was a well known building in the city of Lincoln. Proof of this notice now under consideration was objected to on the ground that the names of no witnesses were indorsed, and that it did not give the place

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of the injury with certainty. It is not now urged that the names of witnesses are necessary, and the only objection which can be considered is that it does not with sufficient definiteness describe the place of the injury. There is nothing in the notice when applied to the evidence that renders it more definite. It appears that between the alley running east and west through block 54 and N street on the south there are six lots abutting upon 9th street, according to the subdivisions of the city plat. North of the alley there is but a single one extending one hundred and forty-two feet to O street. It appears from the evidence that the plaintiff's fall was north of the alley. It appears that all along this walk there were loose planks. The question presented by this objection is simply and wholly whether the complaint that he was hurt along the east side of this three hundred foot block is definite enough to comply with the charter.

It is to be said that neither of the cases from this court, cited by plaintiff as conclusive, go as far as we are asked to go in this instance. In the O'Brien case the position of the hole served as a definite location and in the Pirner case the west side of the "Carr Block." The decision in each of those cases is simply that a statement by the use of which the officer could, by making suitable inquiries, locate the precise spot of the accident is sufficiently definite, and the meaning is that in these descriptions, as in others, inquiries must be such as the terms of the notice itself suggest and for which it furnishes the starting point. We are, however, cited to the case of *Wheeler v. City of Detroit*, 86 N. W. Rep. [Mich.], 822. That case holds that a description similar to this, but more indefinite, that is, a walk on the east side of 15th street between two others is sufficient, on the ground that the court probably took judicial notice that there was only one block intervening between the two streets, and a description locating the accident along one particular block should be held sufficient, as the council did not ask for more specific information, but acted on the claim

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without objection upon that ground. Such is, also, the condition in this case, with the advantage in favor of this description, that we have the positive statement that only one side of a single block is included. Doubtless it would have been competent for the city council to call for more exact information, and their standing to complain would be much stronger had this been done and plaintiff had refused it. If this provision of the charter is to have, as is suggested in *City of Lincoln v. Pirner*, a liberal interpretation, this description should probably be held sufficient in the absence of any call for a more definite one.

It is argued that there is error in the instruction of the court, No. 3, that the jury might find the city had notice if they found that the walk had remained in a defective and dangerous condition for such length of time that the city in the exercise of reasonable care might have had notice of it, and in No. 7, where the jury were told that notice would be presumed, if they found and believed from the evidence that the sidewalk in controversy remained for a considerable length of time in so defective a condition that it was unsafe to travel over. It is claimed that the defect in the walk, if any, was latent; that it was apparently sound and strong; that plaintiff was injured by a plank coming loose when stepped upon by another person, and that the presumption of notice only arises when the defect causing the injury is an obvious one. Counsel for the plaintiff say that the proof of actual notice of the defect in the walk is so complete that this instruction in any event could not have been prejudicial. A somewhat careful examination of the evidence does not disclose this. There is considerable conflict in the testimony with regard to both the actual and apparent condition of the walk. There is testimony that the walk had been examined and repairs ordered and made from time to time, but it cannot be claimed that there was undisputed evidence of actual notice of the particular defect which caused this injury, and the court

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in giving this instruction No. 3 and again substantially in Nos. 6 and 7, evidently regarded the doctrine of presumptive notice as being important in this case. The outer half of the walk seems to have been condemned shortly after the injury for the reason that there were no sleepers under the planks, that they were simply laid down loosely upon the ground. The evidence, however, is conflicting as to whether the walk was visibly defective, one, at least, of defendant's witnesses testifying that the walk did not look as if it was "exactly fit to walk upon." The evidence warranted the submission to the jury of the question of whether or not the walks were in such a defective condition that the defendant and its officers were bound to take notice of it, and in the 8th instruction the jury were told that if the defects were not observable and by the use of ordinary care would not have been observed and no actual notice given to defendant's officers, there could be no recovery.

The objection to instruction No. 8 does not seem to be well taken, because it could hardly have been prejudicial. No attempt was made to prove notice or knowledge on the part of any other officers than the street commissioner and sidewalk inspector. Doubtless the language of the instruction is too broad in allowing notice to "any of the municipal authorities" or "other officers of defendant, city." But as no attempt had been made to prove notice upon any but the proper officers, and the jury was abundantly cautioned not to find such notice unless the evidence showed it had been given, it is not thought that the instructions, taken as a whole, could have misled the jury to defendant's prejudice.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Winside State Bank v. Lound.

WINSIDE STATE BANK V. TOM LOUND.

FILED DECEMBER 18, 1901. No. 10,740.

Commissioner's opinion. Department No. 3.

**Proof of Property of Debtor: INSTRUCTION AS TO EXEMPTION.** When the pecuniary responsibility of a person who is the head of a family is sought to be ascertained by proof of the amount of his property and indebtedness, it is error to refuse to instruct the jury, that for the purposes of the inquiry the fact that a portion of his property is exempt should be taken into account by the jury.

ERROR from the district court for Wayne county. Tried below before ROBINSON, J. *Reversed.*

*Quick & Carter and A. A. Welch, for plaintiff in error.*

*Frank Fuller and Barnes & Tyler, contra.*

AMES, C.

This is a petition in error to review a judgment rendered upon a second trial, in an action which was formerly before this court, and is reported in 52 Neb., 469. The plaintiff in error suffered defeat at the hands of the jury in both trials. Upon the second trial, all the issues of fact were determined by the verdict from the consideration of conflicting evidence, and will therefore not be reviewed except to ascertain whether the court committed an error of law in submitting them to the jury. One of the matters in controversy at the trial, was the value of certain notes executed by one McKinsey, a farmer and head of a family living in the neighborhood. They cannot be said to have had any market value, and the parties were driven to an inquiry concerning the pecuniary responsibility of the maker, which involved, of course, the ascertainment as far as possible, both of the amount, character and value of his property and the nature and extent of his indebtedness. A large amount of evidence concerning these matters was offered by the respective parties and ad-



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mitted. At the conclusion of the trial the plaintiff in error asked to have the jury instructed what were the descriptions and extent in value of the property proved to belong to McKinsey, which were exempt from levy and sale upon execution, for the purposes of consideration in arriving at the extent of his pecuniary responsibility and the value of the obligations in suit.

If McKinsey had been a man of large means or of established financial credit in the community, this inquiry would not, perhaps, have been important, but the evidence shows that he was, at the time, a person of very meager fortune, so that the jury might have found, had the question been put to them, that he owned little, if anything, not exempt from seizure. In response to this view it is suggested, that on account of some peculiar relation between the defendant in error and McKinsey, the notes may have had some especial value to the former, irrespective of the financial responsibility of the maker. It is not necessary to determine whether such fact, if it existed, could have affected the liability of the plaintiff in error. No such matter is pleaded, or was attempted to be proved, and it is, therefore, not worth while to speculate about it. It is also urged that the inquiry was immaterial, because McKinsey, in case of judgment being rendered against him upon the notes, might have waived his rights of exemption, but we think that the probability of his so doing is too slight for consideration. It appears to us, that under the circumstances, the court erred in refusing the instruction requested.

It is recommended that the judgment of the district court be reversed and a new trial granted.

**DUFFIE and ALBERT, CC., concur.**

**REVERSED AND REMANDED.**

Rosso v. Milwaukee Harvester Co.

FRED C. ROSSO V. MILWAUKEE HARVESTER COMPANY.

FILED DECEMBER 18, 1901. No. 10,746.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: EVIDENCE: SUFFICIENCY.** Evidence examined, and *held* sufficient to sustain the findings of the trial court.
2. **Appeal and Error: JUDGMENT SUSTAINED BY EVIDENCE AND FINDINGS: ERRONEOUS CONCLUSION OF LAW.** Where the evidence sustains the findings, and the findings sustain a formal judgment rendered thereon, such judgment will not be reversed because of an erroneous conclusion of law deducted from the findings of fact, such conclusion being merely an expression of opinion by the trial court.

ERROR from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

*Dryden & Main*, for plaintiff in error.

*F. M. Hallowell* and *H. M. Sinclair*, *contra.*

ALBERT, C.

In 1894, the plaintiff agreed to buy a binder of the defendant on condition that it would do good work. With that understanding the binder was delivered to him. After the harvest of that season was over, when called upon to settle for the machine he expressed some dissatisfaction with its work. Some negotiations followed, which resulted in a reduction of \$5 on the price of the machine, and the execution of a contract in writing between the parties, of which the following is a copy:

“KEARNEY, NEB., Aug. 4, 1894.

“This is to certify that I have agreed with Fred Rosso of Prairie Center, that the Milwaukee binder settled for this date does not do good work so far as the cutting of the grain, it did not cut the grain clean and I have agreed to make it do first class work in the season of 1895, and if it cannot be made to do good work a new binder will be given in place of it or the last two notes returned.

“MILWAUKEE HARVESTER Co.,

By C. D. AYRES, *Agt.*”

**Rosso v. Milwaukee Harvester Co.**

This action was brought by the plaintiff to recover for an alleged breach of said contract. The court, to which the cause was tried, made the following findings of fact:

"The court finds, as a matter of fact, that the only trouble the plaintiff had with the machine, and which the machine failed to work during the first year, or 1894, was that it didn't leave smooth stubble and dragged down the grain to some extent and left a small part of the grain uncut; that in every other respect, the machine worked perfectly the first year. That at the time the settlement was made, on August 4, 1894, and the notes given, that this was the only thing concerning which the plaintiff made any complaint or found fault with, and at that time he made no complaint or found any fault that the machine did not bind well, or that it clogged up or something caught and stopped it.

"That because of this difficulty in not cutting the grain clean, the defendant in making settlement with plaintiff, threw off the sum of five dollars and entered into a contract in regard to that defect that he would make the machine work all right and perfectly, and that, so far as this cause of complaint is concerned, the machine did work perfectly thereafter.

"That the cause of the machine clogging up, or the cause of the machinery failing to work was from the wearing of the machinery about the binding part, and not because of any difficulty or defect in the manufacture; that at the beginning of the season of 1895, before the machine became badly worn, it did do good work in every respect."

From the foregoing findings the court deduced the following conclusion of law:

"As a matter of law, the court concludes the contract was a guaranty only against the difficulty complained of by the plaintiff, to the agent of the defendant, at the time the contract of August 4th was made, and was not a guaranty against any other difficulty or failure to work; and that the written contract did not guarantee against the alleged clogging up of the machine."

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A judgment, in due form, in favor of the defendant, was rendered, and the plaintiff brings the case here on error.

It is urged that the findings of the court are not sustained by sufficient evidence. As to the first and second findings, we do not deem it necessary to examine the record to determine that point, because in our view of the case, the third finding alone is sufficient to sustain the judgment. By the terms of the contract, the defendant bound itself to make the binder do good work in 1895. This was not a contract to keep it in repair, nor to indemnify the plaintiff against the wear and damage incident to its use, but to overcome the defects resulting from its faulty construction. The third finding, in effect, is a finding that the defendant performed its part of the contract, as thus interpreted; in other words, that there was no breach of contract. But the plaintiff insists that this finding is not sustained by sufficient evidence. We think otherwise. Among other items of evidence that would warrant this finding, is the clear and unequivocal statement of the plaintiff, in writing, given July 14, 1895, to the effect that the machine had been adjusted and operated to his entire satisfaction. It is urged that the court erred in its conclusion of law. But we think it will not be contended, that, where the evidence sustains the findings, and the findings sustain the judgment, such judgment should be reversed for the expression of an erroneous opinion, by the trial court, of the legal conclusions to be drawn from the facts found.

We recommend that the judgment of the district court be affirmed.

**AMES and DUFFIE, CC., concur.**

**AFFIRMED.**

Phoenix Mutual Life Ins. Co. v. Sparks.

**THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE, v. JAMES A. SPARKS, APPELLANT, IMPLEADED WITH LEVINA J. SPARKS ET AL.**

FILED DECEMBER 18, 1901. No. 10,751.

Commissioner's opinion. Department No. 3.

**Appeal and Error: CONFIRMATION OF SALE: SUFFICIENCY OF OBJECTIONS.** Objections made to the confirmation of a sale examined, and *held* insufficient.

APPEAL from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

*B. O. Hostetler*, for appellant.

*Samuel J. Tuttle, Wm. Gaslin and Tibbets Bros. & Morey*, contra.

DUFFIE, C.

This is an appeal from an order of the district court confirming a sale of real estate made under a decree of foreclosure. All the points discussed in the brief of appellant have been determined by this court in former decisions, with two exceptions to which we will now call attention. It is objected that the notice of sale does not state the county in which the land is situated. A description of the land as contained in the notice is as follows: Lots number seven (7), eight (8), nine (9) and ten (10) in section six (6), in twelve (12), range sixteen (16) west of the 6th P. M. Land is frequently described by giving the section or particular part of the section followed by the township and range in numerals, for example, southwest quarter ( $\frac{1}{4}$ ), of section ten (10), in 12—16. This to every one acquainted with governmental survey of lands would clearly indicate that the southwest quarter ( $\frac{1}{4}$ ) of section ten (10), in township twelve (12) of range sixteen (16) was intended. We do not think that the description was

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so defective that prejudice to the defendants will be presumed in the absence of an affirmative showing.

It is next urged that the decree of foreclosure was entered at an impossible term of court, namely, at an adjournment of the September, 1896, term, held in January, 1897. The decree merely recites the date of its rendition and does not state the term at which it was entered. There is no evidence in the record to support the contention of the appellant except a recital made by the clerk in the order of sale issued by him. We cannot accept a recital of the clerk as evidence that the court entered a decree at a term illegally convened and held. Every presumption is in favor of the regularity of the proceedings of the court, and a mere recital made by the clerk and which was not required by any statute or rule of practice, cannot overcome such presumption. Neither are we prepared to say that a term of court regularly convened in September may not continue over until the succeeding January, provided no regular term had been appointed to take place in January prior to the date of such continued or adjourned term. The decree in this case is fair upon its face. We cannot see from an inspection of the decree that it was entered at a term illegally convened or held. Such being the case, the defendant, if he had objections to urge, should have taken an appeal from the decree itself. We find no error in the record. We therefore recommend the affirmance of the decree.

AMES and ALBERT, CC., concur.

AFFIRMED.

Hoffman v. American Exchange Nat. Bank.

CHRISTIAN S. HOFFMAN V. THE AMERICAN EXCHANGE NATIONAL BANK.

FILED DECEMBER 18, 1901. No. 10,757.

Commissioner's opinion. Department No. 1.

**Collection of Draft by Impostor: LIABILITY OF PAYING BANK.** Where A on receipt of release, made at A's request, of all claim against an estate, and purporting to have been made by B, procures a draft to his own order, indorses it to B's order and sends it by mail to the address given him as B's, and it is there received by the person executing the release and indorsed in B's name, A has no right of action against a bank which pays the draft to the holder, supposing him to be B, though he is in fact an impostor.

ERROR from the district court for Lancaster county. Tried below before HOLMES, J. *Affirmed.*

*Frank J. Kelley and J. J. Boucher*, for plaintiff in error.

The defendant bank is liable because, first, it did not pay the money to Brubaker, and so was not entitled to receive Hoffman's money from the Pennsylvania bank. It had no right or title to either the draft or the money. *First National Bank of Hastings v. Farmers & Merchants Bank*, 56 Neb., 149, 76 N. W. Rep., 430; *Kohn v. Watkins*, 26 Kan., 691; *Palm v. Watt*, 7 Hun [N. Y.], 317; *Tolman v. American National Bank*, 48 Atl. Rep. [R. I.], 480.

Second, Hoffman used proper care and diligence to protect himself against an impostor. *Dodge v. National Exchange Bank*, 20 Ohio St., 235; *Arnold v. Cheque Bank*, 1 C. P. Div. [Eng.], 578; *Onondago Bank v. United States*, 64 Fed. Rep., 703.

Third, Hoffman was the real party in interest. Mechem, Agency, section 522; Story, Agency, section 221; Bliss, Code Pleading, section 51; Code of Civil Procedure, section 32; *Stoll v. Mathews*, 13 Neb., 207.

*Sawyer & Snell, contra.*

The defendant bank is not liable because, first, Hoffman sent the draft to the person to whom he intended to

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send it. *Emporia National Bank v. Shotwell*, 35 Kan., 360, 57 Am. Rep., 171; *Meridian National Bank v. First National Bank*, 33 N. E. Rep. [Ind.], 247; *Robertson v. Coleman*, 141 Mass., 231, 55 Am. Rep., 471, 4 N. E. Rep., 619; *Smith v. Mechanics & T. Bank*, 6 La. Ann., 610; *Levy v. Bank of America*, 24 La. Ann., 220, 13 Am. Rep., 124; *United States v. National Exchange Bank*, 45 Fed. Rep., 163.

Second, Hoffman was negligent while the bank used due diligence. *Crippen, Lawrence & Co. v. American National Bank*, 51 Mo. App., 508; *United States v. National Exchange Bank*, 45 Fed. Rep., 163.

Third, A bill drawn to a fictitious payee is the same as though drawn to bearer. *Kohn v. Watkins*, 26 Kan., 691, 40 Am. Rep., 336.

Fourth, Hoffman is estopped by his indorsement. *Forbes v. Espy*, 21 Ohio St., 474; *Land Title & Trust Co. v. Northwestern National Bank*, 196 Pa., 230, 46 Atl. Rep., 420, 50 L. R. A., 75.

**HASTINGS, C.**

The question in this case is whether or not the defendant bank is liable to plaintiff for the amount of a draft to his order, procured at Elizabethtown, Pa., and indorsed to the order of Peter W. Brubaker, and sent by plaintiff to an impostor at Lincoln, Nebraska, who claimed to be Brubaker, and which was cashed for the impostor by the defendant bank. The plaintiff was acting as disbursing agent for the executor of an estate, from which one Peter W. Brubaker was entitled to receive \$264.15. The plaintiff had made considerable exertions to find Brubaker for the purpose of making this payment, but had failed to do so. Plaintiff had made to Brubaker two previous payments from the estate; one paid by a draft sent to Illinois and receipted for by him, and one payment made to him in person at Elizabethtown, Pa., where plaintiff resides. With reference to this third and final payment plaintiff had written to Omaha and to Illinois and received no response. He finally received a letter dated July 2, 1895, saying:



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"Lincoln, Neb., July 2, 1895. Mr. C. S. Huffman: I got a letter from by brother sade you wanted my address it is Peter W. Brubaker, Lincoln, Neb." To this plaintiff replied as follows: "Elizabethtown, July 5, 1895. Mr. Peter W. Brubaker: This afternoon I received your letter. I have been writing around to the different places where you were before, but the letters came back. You will take the release before a Notary Public, sign and acknowledge and have some person to sign as witness, and then return it to me, and I will send you draft for your share, less expenses. Yours truly, C. S. Hoffman."

The release was executed evidently to plaintiff's satisfaction, for on July 12 he sent the following letter: "Elizabethtown, July 12, 1895. Mr. Peter W. Brubaker, Lincoln, Neb.: Your release to Jacob Risser executor of the will of Peter Oberholtzer, dec'd, came back all right. Inclosed you find draft No. 5774 for \$264.15 which with \$1.75 for the expenses of release and draft is in full of your share in the final distribution of the estate. Please let me hear from you when you get this so I know that all is right. Yours truly, C. S. Hoffman."

The draft mentioned was cashed by the defendant bank; the recipient being identified as Peter W. Brubaker by the notary, Walter A. Leese of Lincoln, before whom the release had been executed and in whose care the final letter and draft were sent by the plaintiff. The evidence, however, shows conclusively that the Peter W. Brubaker who was entitled to this money was not in Lincoln at that time, but in Indiana. He says he received no money. Plaintiff has been called upon to pay it again. The draft cashed by the defendant bank was never indorsed by the Peter W. Brubaker who was entitled to a share in the estate of which Hoffman was disbursing agent. The draft was, by the defendant, transmitted to a New York correspondent and collected through it from the drawer at Elizabethtown, Pa. It was drawn to the order of C. S. Hoffman, by him indorsed payable to the order of Peter W. Brubaker. The district court found that the above facts did

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not show any liability on the part of the defendant bank, and rendered judgment accordingly. That judgment we are asked to reverse as not being sustained by the evidence, and on the ground that the facts shown do constitute a liability against the defendant bank.

The trial court found, first, that the plaintiff intended the draft to be paid to the individual who received the money from defendant, and that defendant was not guilty of any negligence in paying it; second, that the defendant was led and induced to pay the draft by the acts of plaintiff, and plaintiff's negligence prompted its payment; and, third, that the plaintiff was not the real party in interest and could not maintain the action, it appearing that he was simply the agent of Risser, the executor of the estate from which the money came.

The liability of defendant is asserted on the grounds set forth in section 42 of the negotiable instruments' act of New York, which has been enacted in effect in fourteen other states and is claimed to be declaratory of the common law. Said section 42 reads as follows: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

It is claimed that this signature is a forgery, and the defendant therefore liable. As above stated there seems to be no doubt that the real Peter W. Brubaker who was among the heirs of this estate never indorsed this draft. But it also seems clear that the plaintiff is not entitled to set up this claim. A recent case in Rhode Island, *Tolman v. American National Bank*, 48 Atl. Rep. [R. I.], 480, seems to sustain plaintiff's contention. Its syllabus has the following: "A check drawn payable to the order of A was procured by representations that the person to

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whom it was given was A, and the indorsement of the latter was forged thereto, and it was paid by the bank. *Held*, that the bank was liable to the drawer for such sum, both at the common law and under the statute." Rhode Island has adopted the statute above cited. The weight of authority, however, seems to be decidedly in favor of the doctrine that where a check or draft is drawn or indorsed and delivered to a party to be cashed by him under the name in which it is made out or indorsed, that his signature by way of indorsement in that name is valid as between an innocent holder and the party delivering it to him. This is commonly put on the ground that the payer of the draft or the purchaser of it is simply carrying out innocently the intention of the maker or indorser. *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App., 322, 52 Am. St. Rep., 450; *Robertson v. Coleman*, 141 Mass., 231, 55 Am. Rep., 471; *Levy v. Bank of America*, 24 La. Ann., 220, 13 Am. Rep., 124; *Land Title & Trust Co. v. Northwestern National Bank*, 196 Pa. St., 230, 50 L. R. A., 75. It is also placed sometimes as was done in a measure in this instance by the trial court, on the ground of negligence on the part of the maker. It is sometimes held that the payee is a fictitious person and the check or draft therefore payable to bearer.

It is suggested in defendant's brief that the exemption from liability is more properly placed on the ground of estoppel or, as it is stated in the negotiable instruments' act, that the party is "precluded from setting up the forgery or want of authority." It certainly would seem that in this case when Mr. Hoffman was satisfied with the release he got and mailed the draft to the maker of that release he asserted as definitely as a man could, his desire that this money should be paid where it was paid. After that desire has been acted upon and the false Brubaker has received the money, it would seem too late for the plaintiff to discover his mistake and collect the money back from one who had paid it out to the individual he requested, though not to the one to whom he thought he was requesting to have it paid.

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It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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CHRISTIAN S. HOFFMAN V. AMERICAN EXCHANGE NATIONAL BANK.

FILED JUNE 18, 1902. No. 10,757.

Commissioner's opinion. Department No. 3.

**Collection of Draft by Impostor: LIABILITY OF PAYING BANK.** Where an impostor assumes the name of another person, and thereby induces a third person to believe he is the person whose name he has assumed; and, acting on such belief, such third person indorses a draft, designating the payee by the name assumed by the impostor, and delivers it to such impostor in the belief that he is dealing with the person whose name has been assumed, and the impostor indorses the draft, using such assumed name, and transfers it to an innocent purchaser, the purchaser takes title by such indorsement.

REHEARING of case reported *ante*, page 217.

ERROR from the district court for Lancaster county. Tried below before HOLMES, J. *Former opinion adhered to.*

*T. J. Mahoney and J. J. Boucher*, for plaintiff in error.

*Sawyer & Snell*, contra.

ALBERT, C.

A resident of Pennsylvania died, leaving a will, of which one Peter Risser was appointed executor, and in which one Peter W. Brubaker was named as one of the legatees. The executor appointed the plaintiff in this case as agent to transact the business for him. On the first distribution of the estate made, the share of Peter W. Brubaker was

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sent to him by draft through the mails to Illinois; on the second distribution he received his share in person from the agent of the executor; when the final distribution was made, his whereabouts were unknown to the executor, and his agent wrote from time to time to various places seeking to discover his address, but his letters were returned. Afterward, the agent received the following letter from an impostor: "Lincoln, Neb., July 2, 1895. Mr. C. S. Huffman: I got a letter from my brother sade you wanted my address it is Peter W. Brubaker, Lincoln, Neb."

The agent immediately sent a release, together with a letter directing the party to go before a notary public, sign and acknowledge the release and return it to him, and informing him that on the receipt of such release, the agent would remit the amount due on the final distribution. The release and the letter were received by the impostor who signed and acknowledged the same before a notary public in Lincoln, using the name Peter W. Brubaker, whereupon the release was returned to the agent. The agent then purchased a draft for the amount due Peter W. Brubaker, drawn on a bank of Philadelphia, payable to himself, which he indorsed, "pay to the order of Peter W. Brubaker, C. S. Hoffman," and enclosed it in an envelope addressed to Peter W. Brubaker, Lincoln, Neb., in care of the notary before whom the return was acknowledged, together with a letter stating, "the release came back all right; I enclose draft for \$264.15." The letter inclosing the draft was received at the office of the notary public, and was delivered by him to the impostor. The notary public accompanied the impostor to the defendant bank and there identified him as Peter W. Brubaker. The imposter indorsed the draft, using the name Peter W. Brubaker, and delivered it to the defendant, who paid him the amount due thereon, and forwarded the draft to its eastern correspondent, by whom it was collected, and the amount placed to the credit of the defendant. The impostor disappeared and has never since been seen or heard

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of, and none of the parties connected with the transaction knew who he was, nor anything about him, save such facts as appear in the foregoing statement. Afterward, the real Peter W. Brubaker, being then in Omaha, learned of the final distribution of the estate, and wrote to the agent demanding payment of his share. The agent was finally convinced that payment had been made to the wrong party, and tendered the draft to the defendant and demanded payment. Payment was refused, whereupon this suit was instituted to enforce payment. A trial was had to the court, without a jury, which resulted in a finding and judgment for the defendant. The plaintiff brings the case here on error.

The plaintiff insists that the sole question in this case is, whether the indorsement of the draft by the impostor was a forgery. We do not believe a determination of that question will dispose of this case. That the indorsement was a forgery, may be conceded; but it does not necessarily follow that the plaintiff is entitled to recover in this action. We think the majority of cases, certainly the best considered cases, hold that, under the circumstances shown in evidence in this case, an innocent purchaser is protected by such indorsement. *Meridian National Bank of Indianapolis v. First National Bank of Shelbyville*, 34 N. E. Rep. [Ind.], 608; *Emporia National Bank v. Shotwell*, 35 Kan., 360; *Kohn v. Watkins*, 26 Kan., 691; *Land Title and Trust Co. v. Northwestern National Bank*, 196 Pa. St., 230, 46 Atl. Rep., 420; *Robertson v. Coleman*, 141 Mass., 231; *United States v. National Exchange Bank*, 45 Fed. Rep., 163; *Crippen, Lawrence & Co. v. American National Bank of Kansas City*, 51 Mo. App., 508; *Forbes v. Espy*, 21 Ohio St., 474.

It has been suggested that the cases just cited may be classified under four heads, the basis of such classification being the ground upon which the courts place their respective decisions, which are as follows: first, that such indorsement effectuates the intention of the drawer; second, that the drawer has been guilty of negligence;

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third, that the drawer is to be treated as a fictitious person; fourth, estoppel. But such classification is unscientific, and is based on the language of the opinions, rather than upon any principle underlying them. A careful analysis of the cases will show, we think, that the controlling principle in each is that of estoppel, which, to our minds, is peculiarly applicable to cases of this character.

The plaintiff had money which belonged to Peter W. Brubaker; an impostor assumed the name of Peter W. Brubaker, and claimed the money; his identity was a question for the plaintiff; satisfied that he was dealing with the real Peter W. Brubaker, the plaintiff indorsed and delivered the draft to the impostor. Of the contractual obligation thus created, the delivery of the draft was an essential element, and stamped the impostor as the person to whose order the plaintiff intended payment to be made. In other words, by the delivery of the draft to the impostor, the plaintiff held him out to the world as his indorsee, and as the person to whose order he had, by his indorsement, directed payment to be made. He cannot now be heard to complain that the defendant acted on the *indicia* of identity with which he himself had clothed the impostor.

The plaintiff relies on the case of *Rogers v. Ware*, 2 Neb., 29, wherein it is held that if a draft "be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary, in order to a recovery thereon by an indorsee, even though he have no interest in it, and the drawer knew that fact." That case would tell in favor of the plaintiff, only on the theory that, when he indorsed and transmitted the draft to the impostor, he had in mind, as his indorsee, the real Peter W. Brubaker. But that theory is not supported by the facts. The name the plaintiff had in mind, undoubtedly, was Peter W. Brubaker; but the person whom he had singled out, as



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the person bearing that name, and, as the one entitled to the money in his hands, was the impostor. This becomes clear, when we remember that he insisted on a release, before transmitting the draft, and transmitted it on receipt of the release. The person he had in mind, as his indorsee, was the person who executed the release, which was the impostor. The real Peter W. Brubaker, under the circumstances, was not entitled to the draft, because he was not the person who executed the release; his indorsement of the draft would have been forgery.

The case of *First National Bank of Hastings v. Farmers and Merchants Bank*, 56 Neb., 149, is also relied upon by the plaintiff. The facts in that case are as follows: The correspondent of a loan company presented an application for a loan, purporting to be signed by one B, on certain lands; the application was accompanied by an abstract, showing title to the land in B; the loan was accepted, and a bond and mortgage, purporting to be executed by B, forwarded to the company; whereupon the company sent its check for the amount of the loan, payable to B; the check was presented to a bank by the correspondent bearing what purported to be the indorsement of B, and that of the correspondent; the bank paid the correspondent the amount of the check, and, in turn received payment thereon from the bank on which it was drawn; B did not own the land, and the abstract was false and a forgery. The bank on which the check was drawn brought suit against the other bank to recover back the amount of the check. There was evidence tending to show that B was a fictitious person, and that the correspondent had made the application, executed the bond and mortgage and indorsed the check himself. This court held: first, that, if the application was made, and the bond and mortgage executed by a third person, and that person indorsed the check, the indorsement was genuine, whether or not his real name was B, although he did not own the land; second, if the correspondent himself signed the application, bond and mortgage, and indorsed the check (using



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the name B), the indorsement was a forgery. The principle involved in the first hypothesis of the court, we think, is the same as that applied in this case. That is, if the impostor was the person actually intended as the payee, his signature, though given under an assumed name, was genuine. As to the second hypothesis, it is based on a different state of facts. The local agent was not holding himself out as the real applicant, nor was the loan company dealing with him as such; the person for whom it intended the draft, and whom it had in mind as the payee, had no existence but was a fictitious person. In the present case, the person for whom the draft was intended, and whom the plaintiff had in mind as the payee, was a real person claiming to be Peter W. Brubaker. We think the cases are clearly distinguishable.

The *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb., 793, is also cited in support of plaintiff's petition. We do not consider that case in point. In that case, a pay check was stolen from the payee, his indorsement forged, and payment obtained on the forged indorsement. It is clear that there the indorsement was not made by the party the drawer had in mind as payee. The distinction between this case and the present is obvious.

It is recommended that the conclusion reached in the former opinion be adhered to, and, that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

The conclusion reached in the former opinion is adhered to and the judgment of the district court is affirmed.

AFFIRMED.

Nash v. Wilkinson.

LOUIS C. NASH, APPELLEE, v. WILLIAM C. WILKINSON ET AL., IMPEADED WITH H. E. BUSH, APPELLANT, ET AL.

FILED DECEMBER 18, 1901. No. 10,758.

Commissioner's opinion. Department No. 1.

**Judicial Sales: AFFIDAVIT OF PUBLICATION FILED AFTER SALE.** A sheriff made a sale under a decree of foreclosure, and did not file with his return the affidavit of the publisher showing due publication of the notice of such sale until the day after it actually took place. *Held*, Not prejudicial to the rights of the mortgagor or owner of the land.

APPEAL from the district court for Phelps county. Tried below before BEALL, J. *Affirmed*.

*W. P. Hall and S. A. Dravo*, for appellant.

*Dryden & Main*, contra.

KIRKPATRICK, C.

This is an appeal from an order of the district court for Phelps county confirming a sale of certain lands made by the sheriff on a decree foreclosing a mortgage. Appellant, in the district court, objected to the confirmation of the sale for the reasons that the property was appraised too low, that the appraisers were not freeholders, that no notice of the sale was published in a newspaper, as required by law, and that the sheriff did not make his return within sixty days from the time he received the order of sale. These objection were not made until long after the sale was had, and it is very questionable whether they are sufficiently specific to present any question for the consideration of the trial court.

Counsel for appellant admit that none of the objections is well taken, except the one alleging that no notice of the sale was published as required by law. This objection seems to have been based upon the proposition that the publisher, who had sworn to the affidavit showing the publication of the notice, had failed to sign the affidavit,

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and that the clerk of the district court, when he administered the oath, had failed to attach his seal. Since the filing of appellee's brief, this court, on motion of appellees, has permitted to be filed, as a part of the record, a corrected copy of the affidavit, which shows that the affidavit was properly signed by the publisher of the paper, and that it was properly sworn to before the clerk, and that the seal of the clerk was attached. There seems to be an entire want of merit in this appeal.

It is further objected that the affidavit of publication was not really filed in the office of the clerk of the district court until the day after the sale was made. This would not tend to prejudice the appellant. There was no error in the order of the district court confirming the sale. It is therefore recommended that the order of the district court confirming the sale be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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RASMUS HANSEN V. CHRISTOPHER MORTENSEN ET AL.

FILED DECEMBER 18, 1901. No. 10,763.

Commissioner's opinion. Department No. 3.

**Pleading:** SUFFICIENCY OF PETITION. Petition examined, and *held* that the demurrer thereto was properly sustained.

**ERROR** from the district court for Howard county. Tried below before KENDALL, J. *Affirmed.*

*Beall & Robinson*, for plaintiff in error.

*Henry Nunn* and *J. A. Haggart*, *contra.*

ALBERT, C.

The plaintiff filed a petition, against the defendants in the following words and figures:

"The plaintiff complains of the defendants and for

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cause of action alleges, that on or about the 24th day of March, 1887, the above named Rasmus Hansen, for and in consideration of the sum of \$4,840 and other valuable considerations paid and given by Bertie Marie Hansen, his then wife, made, executed and delivered to the said Bertie Marie Hansen for the use and benefit of their children, Anna Oline Hansen, Marie Hansen, Petrine Jacobine Hansen and Hans. Chr. Hansen, his certain mortgage deed in writing for the sum of \$1,000 covenanting and agreeing therein to pay each of said children when they respectively became of the age of 21 years the sum of \$250. That said total sum should bear interest at the rate of 7 per cent. per annum payable annually, said interest to be paid to, and collected by the person or persons on whom the support of said children devolves.

“Said mortgage conveyed, subject to the conditions and limitations therein written, the following described real estate then owned in fee by the said Rasmus Hansen and situated in Howard county, Nebraska: northwest quarter of section twenty-three (23) in township sixteen (16) range ten (10).

“Neither said mortgage nor the debt evidenced thereby, nor the interest thereon due on the 24th day of March, 1897, have been paid and there is due and unpaid as such interest the sum of \$70.

“That subsequent to the 24th day of March, 1887, the said Rasmus Hansen conveyed said land by warranty deed to one F. O. Malmgren by request of, and for the use and benefit of one Andrew Brock, subject to the said mortgage of \$1,000, the same being a part of the consideration for said land which said mortgage the said Andrew Brock agreed to assume and pay as a part of the consideration for said land.

“That on or about the 15th day of February, 1888, said F. O. Malmgren conveyed said land as by a pre-arranged agreement, to one Andrew Brock, one of the above named defendants, subject to said mortgage which said mortgage the said Andrew Brock assumed and agreed to pay

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as part of the consideration for the said land together with the interest thereon until full payment should be made according to the conditions of said mortgage.

“That on or about the 14th day of March, 1889, the said Andrew Brock and Matilda Brock his wife sold and conveyed said land to Christopher Mortensen one of the above named defendants by warranty deed and the said Christopher Mortensen assumed and agreed to pay said mortgage with all the interest thereon as part of the consideration for said land.

“That the said Christopher Mortensen is now the owner of said land in fee and has failed to pay the interest on said mortgaged debt for the year ending March 24, 1897 and said interest is past due and wholly unpaid.

“That the agreement of the said Andrew Brock and Christopher Mortensen whereby they each respectively assumed and agreed to pay said mortgaged debt and the interest thereon as above set forth were each verbal and made at the time the conveyances were made to them and each of them.

“A true copy of said mortgage is hereto attached and made a part hereof and marked ‘Ex. A.’

“That by reason of said agreement and the failure of the said defendants to pay the interest on said debt as aforesaid the said defendants and each of them have become and are liable to and are indebted to this plaintiff in the sum of \$70.

“That the said Rasmus Hansen the above plaintiff is the father of the said above named children and the person on whom the care and support of said children devolves, and said children are now in the care of and under the control of said Rasmus Hansen.

“Wherefore plaintiff prays for judgment against the defendants for the sum of \$70 with interest from March 24, 1897, and for costs.”

The instrument referred to in the petition as “Exhibit A,” so far as is material to this case, is, as follows:

“This indenture made this 24th day of March, 1887,

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witnesseth: That I, Rasmus Hansen, of Howard county, Nebraska, for and in consideration of \$4,840 in hand paid by my wife, Bertie Marie Hansen, do by these presents bind myself, my heirs and assigns as follows to-wit, whereas Anna Oline Hansen, nine years old, and Petrine Jacobine Hansen, six years old, and Hans Christian Hansen, four weeks old, being the lawful issue of myself Rasmus Hansen and Bertie Marie Hansen, and whereas it is desired by said Bertie Marie Hansen that said Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen and Hans Christian Hansen or their heirs shall have and receive a portion of the estate of said Bertie Marie Hansen, it is hereby understood and agreed that in consideration of the sum above mentioned that I, Rasmus Hansen, am bound and firmly held unto Bertie Marie Hansen and to Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen and Christian Hansen to perform the following conditions, to-wit: that on the day each of the above mentioned children become of the age of 21 years I shall give to Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen, and Hans Christian Hansen the sum of \$250 each, and it is hereby understood and agreed by and between Rasmus Hansen and Bertie Marie Hansen that this instrument shall be a legal and binding lien upon the northwest quarter of section twenty-three (23) in township sixteen (16) range ten (10) in Howard county, Nebraska. \* \* \* And it is hereby understood and agreed \* \* \* that said sum of \$1,000 shall draw interest at the rate of 7 per cent. per annum from this date. And that said interest shall be paid to the person upon whom the support of the said Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen and Hans Christian Hansen shall fall. It is further agreed and understood that in default of the payment of the said sum of \$1,000 when the same shall become due, as specified herein, or in default of the payment of the interest at the end of each year after the date of this instrument or any part of said interest, or in default of the payment of the taxes as herein specified then

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the said Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen and Hans Christian Hansen or their legal representatives may foreclose this lien in the same manner and subject to the same conditions that mortgages in equity are foreclosed, and the \$1,000 and the interest derived from said sale shall be converted into good security bearing not less than 7 per cent. interest payable annually.

“Provided however, that before foreclosure of this lien said Anna Oline Hansen, Petrine Jacobine Hansen, Marie Hansen, and Hans Christian Hansen or their legal representatives shall enter into bonds in probate court for the faithful performance of the conditions mentioned in this instrument in the sum of \$3,000 in the same manner as in case of the original appointment of guardian of minor children.”

The defendants each interposed a demurrer on the grounds that the plaintiff lacked legal capacity to sue, that there was defect of parties plaintiff, and that the facts stated in the petition were insufficient to constitute a cause of action. The demurrer was sustained and the cause dismissed. The plaintiff brings the case here on error.

In our opinion, the demurrer was properly sustained. If the plaintiff is entitled to maintain this action, it is by virtue of that provision of the mortgage, which makes the interest payable to the person upon whom the support of the beneficiaries devolves. We do not believe it was the intention of the parties to that instrument to confer upon some person, who, in the nature of things, must have been unknown to them at the time, the power to collect and handle this money at his own will and pleasure. On the contrary, we think, it is clear, from the entire instrument, that the intention was to provide for the payment of a certain sum when the beneficiaries should have respectively attained the age of twenty-one years, and a certain income that might be applied to their support and maintenance during that period. In other words, the contract was for

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their exclusive benefit. All payments falling due are payable only to them or their legally appointed guardian, who by the terms of the instrument is charged with the duty of applying the interest on the \$1,000, so far as needful, at least, to their support and maintenance during minority. If we are correct in this construction of the instrument, it follows that the plaintiff lacks legal capacity to maintain the action, that the facts stated in the petition are insufficient to constitute a cause of action, and that the court did not err in sustaining the demurrer.

We recommend that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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ANGELINE H. KINGSLEY, APPELLEE, v. JOHN SVOBODA, APPELLANT, IMPLEADED WITH TRESSA SVOBODA ET AL.

FILED DECEMBER 18, 1901. No. 10,765.

Commissioner's opinion. Department No. 3.

**Appeal and Error:** CONFIRMATION OF SALE: SUFFICIENCY OF OBJECTIONS. Objections urged against a confirmation of a sale examined, and *held* insufficient.

APPEAL from the district court for Howard county. Tried below before KENDALL, J. *Affirmed.*

*Bell & Robinson*, for appellant.

*Tibbetts Bros., Morey & Anderson*, contra.

DUFFIE, C.

This appeal, being from an order confirming a sale, presents no question fatal to the order made, which can be determined in the absence of a bill of exceptions. We have in the record only the order of sale, the appraisal, the notice of sale, the certificates of the county clerk, county treasurer and clerk of the district court relating to liens,



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the order of confirmation and the objection to confirmation. What evidence the court acted on in confirming the sale outside of what the record disclosed, is not known. It is said that the certificates relating to liens were not "filed," meaning, as we understand from appellant's brief, that the clerk failed to place any filing mark on them. These certificates appear in the record and the presumption must obtain in the absence of a contrary showing that the district court had evidence before it showing the sale to have been regularly made. The return of the sheriff shows that the sale was made to McKinley-Lanning Loan and Trust Company for \$700. The presumption is that the money was paid, and there is nothing before us to rebut the presumption.

We discover no reversible error in the record and recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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WILLIAM R. ALLING, TRUSTEE, APPELLEE, v. NELLIE WOODARD, APPELLANT, IMPLEADED WITH T. CHARLES CANNON ET AL.

FILED DECEMBER 18, 1901. No. 10,786.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: PETITION: ALLEGATION AND PROOF.** That no proceedings at law have been had for the recovery of the debt secured by the mortgage, is a material allegation in a petition for the foreclosure of a mortgage and when put in issue must be proved.
2. **Tax Certificate: EVIDENCE.** A tax certificate is presumptive evidence of the regularity of all proceedings leading up to the sale, including the assessment and levy. *Merrill v. Wright*, 41 Neb., 351, overruled.
3. **Tax Lien: FORECLOSURE BY ASSIGNEE: COMPUTATION OF AMOUNT DUE.** In an action to foreclose a tax lien, by the assignee thereof, in computing the amount due thereon, it is error to include subsequent taxes paid by the assignor, subsequent to the assignment.

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APPEAL from the district court for Dawes county. Tried below before WESTOVER, J. *Reversed.*

*Allen G. Fisher*, for appellant.

*Albert W. Crites*, contra.

ALBERT, C.

This action was brought by the plaintiff to foreclose a real estate mortgage, executed by the defendant, Nellie Woodard. The New England Loan & Trust Co. intervened, and asked the foreclosure of a tax lien on the premises by virtue of a tax-sale on said premises to one T. A. Thompson, who on the 1st day of October, 1893, assigned the certificate of such sale to one I. C. Cannon, who, it is alleged, on or about the 1st day of June, 1897, assigned said certificate to the intervener. The defendant, Nellie Woodard, denied all the allegations, both of the petition of the plaintiff and that of the intervener. The trial court found in favor of the plaintiff, and that its mortgage was a second lien on the premises; and in favor of the intervener, and that it had a first lien. The premises were sold under the decree, and the sale confirmed. The defendant, Nellie Woodard, brings the case here on appeal.

As against the decree in favor of the plaintiff, it is urged, that there is a total want of proof, in support of the allegation of the petition, that proceedings at law have been had for the recovery of a debt secured by the mortgage. This is a material allegation, and was put in issue by the answer and is wholly unsupported by the evidence. Under the repeated holdings of this court, such omission is fatal to plaintiff's decree. *Kirby v. Shrader*, 58 Neb., 316; *Jones v. Burtis*, 57 Neb., 604.

As against the decree in favor of the intervener, it is urged that there is no competent evidence of any levy or assessment. The certificates issued to the purchaser by the treasurer in pursuance of the tax-sale, under which the intervener claims, were received in evidence. Section 116

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of the revenue act provides that such certificate "shall be presumptive evidence of the regularity of all prior proceedings." The phrase, "all prior proceedings," in our opinion, includes every step, leading up to the tax sale, including the levy and assessment. In that view of the case the evidence is sufficient on the point named.

The tax-sale to Thompson took place November 7, 1892; the certificate was assigned to Cannon October 1, 1893; on October 23, 1893, Thompson paid the taxes for 1892, and on the 11th day of June, 1894, paid the taxes of 1893. Both of these payments were made after the assignment of the certificate to Cannon, and both, with interest thereon, are included in the amount found due the intervener. In this, we think, there was error. Whatever may have been the reason for the payment of these taxes by Thompson, after his assignment of the certificate, it is clear to our minds, that such payments, on the state of facts shown by the record, did not inure to the benefit of the holder of the certificate to such an extent as to make them available to him in an action to foreclose his tax lien. There may be good reasons why this should be included in the decree, but no such reason appears in the record. The amount paid at the time of the tax sale, as shown by the tax certificate was \$20.44; there is no evidence of the payment of any subsequent taxes by the holder of such certificate. The decree of the intervener should have been for \$20.44, with interest according to law.

The notice to redeem, introduced in evidence, is dated July 20, 1894, and recites that "the undersigned being now in possession of and owner of said certificate of purchase," and is signed by Thompson, the original purchaser at the tax sale. The defendant insists that the recital in such notice is conclusive on the intervener, that Thompson was the owner of the certificate at the date of the notice, and that, as the record fails to show an assignment by him to any person after that date, there is a failure to prove that the intervener is the owner of the tax lien. We

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do not concur in that view. It is clearly shown in evidence, that Thompson assigned the certificate to Cannon, October 1, 1893. Why he thereafter gave the notice to redeem, or why it was introduced in evidence, we are unable to understand, but that its introduction is not conclusive as claimed by the defendant, to our mind, is clear. Objections are also urged to the order of confirmation of the sale for the satisfaction of the decree, but, as the decree must be reversed, it would serve no good purpose to discuss them.

In view of the record we recommend that the decree of the district court, both as to the plaintiff and the intervenor, be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

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WILLIAM MIZNER, APPELLEE, V. SCHOOL DISTRICT NO. 11 OF  
SHERMAN COUNTY ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 12,117.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: EVIDENCE AS TO RESIDENCE IN SCHOOL DISTRICT: SUFFICIENCY.** Evidence examined, and *held* sufficient to support a finding of the court that a child was a *bona fide* resident of a school district.
2. **Action to Have Child Admitted to School: WHO MAY BRING.** The father of a child of school age, or one standing *in loco parentis* to the child, may maintain an action to compel the directors of a school district to allow the child to attend a school of which such child is a *bona fide* resident.
3. **Child Entitled to Admission to School: INJUNCTION.** Where a child of school age is wrongfully denied admission to the public school of a district, an injunction may properly issue to restrain the directors of the school from interfering with her attendance.

APPEAL from the district court for Sherman county.  
Tried below before SULLIVAN, J. *Affirmed.*

## Mizner v. School District.

*R. J. Nightingale*, for appellants.

*Wall & Williams*, contra.

DUFFIE, C.

The facts in this case are few and practically undisputed. The defendants, Niles, Ryerson and Zahn, constitute the school board of school district No. 11 of Sherman county, Nebraska. William Mizner, the plaintiff, is a resident of said district; Ivy Bellinger is his sister-in-law and came to reside with him sometime in December, 1899. Eli Bellinger, the father of Ivy Bellinger, was a resident of Custer county, Nebraska, and a *bona fide* resident of district No. 132 of Custer county, and Ivy resided with her father and attended school in Custer county up to about December 1, 1899. After Ivy came to live with the plaintiff, she commenced to attend school in district No. 11 in Sherman county. No permission was sought or obtained from the school board. After having attended the school for some time, the members of the board met and passed a resolution prohibiting her attendance, and then ejected her from the school. Thereupon this action was brought to restrain the defendants from interfering with her attendance and to restrain them from ejecting her from the school, or denying her the privileges thereof. Upon a hearing the court entered a decree in favor of the plaintiff and enjoined the defendants from interfering with Ivy's attendance at school. From this decree the defendants have appealed to this court.

Appellants insist that Ivy Bellinger is not a *bona fide* resident of school district No. 11 and not entitled to the privileges of the school in that district except with the consent of the school board and the payment of tuition. The court found the facts as follows: "First. That the parent of the child, Ivy Bellinger, is now and for more than three years last passed has been a resident of Custer county, Nebraska. Second. That the plaintiff at the time this suit was begun and for a period prior thereto, was a

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resident of Sherman county and of school district No. 11 of Sherman county. Third. That on or about December 2, 1899, the parents and the plaintiff with the child entered into an agreement whereby it was agreed by the parents that the child should make her home with the plaintiff at his home in school district No. 11, and in pursuance of such agreement, the child began to make her home with the plaintiff in said school district on December 2, 1899. Fourth. That at the time the agreement was made between the plaintiff and the parents, and at the time the child began living with plaintiff, no definite time within the understanding of the parties was fixed as to when, if at all, she should leave the home of the plaintiff, but that she should abandon the home of her parents, under and in pursuance of said contract, without any intention to immediately return to the home of the parents or to return at any definite or fixed time, if ever. Fifth. That the child, Ivy Bellinger, at the time the suit was instituted, was a resident of school district No. 11, and as a matter of law was entitled to the privileges of said school in said school district and that at said time she was of the age of sixteen years. Sixth. That the school board, at the time the suit was instituted, threatened and were about to prevent her by force from attending the school of said district."

We think that the evidence would have warranted the court in going further and finding that there was a definite agreement between the plaintiff and Ivy Bellinger and her parents that she was to live with him until she attained the age of twenty-one years, and that during that time he was to care for her as a member of his own family. Under the facts found, we have no doubt that Ivy Bellinger was a *bona fide* resident of the district. It is true that the home of a child is usually with its parents, but this is not always the case. A guardian may be appointed for a child whose parents are living, and in such case if the child resides with the guardian, the residence of the guardian would be the residence of the child. So too, a child may be adopted, and the residence of its adopted parents would be the resi-

## Mizner v. School District.

dence of the child. Where, as in this case, the child with the consent of her parents goes to live in the family of another as a member of the family and under an agreement that that is to be her home, and she is to be cared for and provided with school facilities, she becomes a *bona fide* resident of the district where living, and the person with whom she resides occupies the relation of a parent, stands *in loco parentis*, and may demand for her every right to which his own natural child is entitled. It is insisted however, that if this be so, that the action cannot be maintained in the name of the plaintiff; that it should have been instituted and prosecuted in the name of Ivy Bellinger; that she is the real party in interest. As we have already seen the plaintiff stands *in loco parentis* to this child. Not only was it his privilege but it was his duty under his agreement with her and her parents to see that she received such school facilities as the district afforded. It would scarcely be claimed that the plaintiff would not have a right of action against the defendants if they denied to his own child the school facilities offered by the district. In this day and age, it is everywhere recognized that the parent is as much interested in the education of his children as are the children themselves; and whenever access to a public school is refused or denied a child, no court would deny the parent relief on the ground that he has not sufficient interest in the education of his child to entitle him to bring and maintain an action to secure his legal rights in that regard.

Again, it is urged that injunction will not lie; that conceding the right of Ivy Bellinger to attend the school, and the denial of that right by the defendants, that the proper action is mandamus, and that equity will not interfere to afford relief. No one will attempt to deny the rule that where an adequate remedy of law exists, equity will not interfere; but did the plaintiff have an adequate remedy at law in this case? Was there any legal remedy which offered the full, adequate and speedy relief to which the plaintiff was entitled? Ivy was past sixteen; her school

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days were nearly over; she was entitled and the plaintiff had the legal right to demand that she should attend this school from day to day. A denial of school facilities is a serious matter. The damage cannot be measured in dollars and cents; no money compensation would adequately recompense one for a failure to receive even such an education as is afforded by our common schools. The only speedy and adequate relief offered to the plaintiff was a resort to the extraordinary remedy of an injunction. Under the circumstances, we think that he was entitled to appeal to the equity side of the court for this remedy. As before stated, no court of law could adequately measure the damage which he or Ivy might sustain by being expelled from the school, by being denied an education. There is probably no other case where the court would so quickly extend to the aid of the plaintiff its full powers. We are satisfied that the evidence fully warrants the findings of the court, and that these findings fully support the legal conclusions reached.

We therefore recommend that the decree appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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WILLIAM MIZNER, APPELLEE, v. SCHOOL DISTRICT No. 11  
OF SHERMAN COUNTY ET AL., APPELLANTS.

FILED OCTOBER 7, 1903. No. 12,117.

Commissioner's opinion. Department No. 3.

REHEARING of case reported *ante*, page 238, 96 N. W. Rep., 128.

APPEAL from the district court for Sherman county. Tried below before SULLIVAN, J. *Former judgment of affirmance adhered to.*



State v. Fawcett.

*R. J. Nightingale*, for appellants.

*Wall & Williams*, contra.

ALBERT, C.

A reargument of this case has not changed our views as expressed in the former opinion, reported *ante*, page 238, and in 96 N. W. Rep., 128, and it would serve no useful purpose to reiterate them.

It is therefore recommend that the former judgment affirming the decree of the district court be adhered to.

FORMER JUDGMENT OF AFFIRMANCE ADHERED TO.

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STATE, EX REL. EMIL PIERSON, RELATOR, V. JACOB FAWCETT, JUDGE OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA, RESPONDENT.

FILED DECEMBER 18, 1901. No. 12,289.

Commissioner's opinion. Department No. 2.

1. **Purpose of Bill of Exceptions.** The function of a bill of exceptions is to bring into the record the facts on which the trial court decided the questions of law presented for review.
2. **Appeal and Error: AFFIDIVITS NOT PRESENTED TO TRIAL COURT.** Affidavits not presented to and considered by the trial court will not be considered in this court in the event that the case is brought to this court for review, and therefore should not be included in the bill of exceptions.

ORIGINAL application in this court for a writ of mandamus to compel the respondent to settle, sign and allow what purports to be a bill of exceptions. *Writ denied.*

*W. A. Corson* and *V. O. Strickler*, for relator.

*Silas Cobb*, for respondent.

## OLDHAM, C.

This is an original action brought in this court for the purpose of procuring a writ of mandamus to compel Hon. Jacob Fawcett, one of the judges of the fourth judicial district of this state, to settle, sign and allow what purports to be a bill of exceptions. An alternative writ was herein allowed by the chief justice and this is a hearing had upon the rule to show cause, upon which we heard the evidence of the respective parties.

The testimony discloses that there was an action pending in the district court for Douglas county, entitled, *The State of Nebraska v. The Nebraska Savings and Exchange Bank*. This action having been instituted by the attorney general by the direction of the state banking board for the purpose of winding up the affairs of the defendant bank which was insolvent. That one William K. Potter was the receiver thereof, and that this case was on the docket that Judge Fawcett had in charge. That the relator and the others were creditors of this bank. That on June 24, 1901, the receiver procured an order in the district court for Douglas county, Nebraska, Judge Fawcett presiding, permitting him "to pay a dividend of fifty-six per cent. of the balance due on claims as originally allowed against said bank to the owners of the receiver's certificates." That afterwards a motion was filed—in said case by "Michael Carmody, John Mackin and fifty-three other depositors." After lengthy recitations and allegations, the motion concludes as follows: "Wherefore, we move that the court modify said order, so signed, June —, 1901, by directing said receiver to pay to said depositors the said sum of fifty-six per cent. upon their unpaid claims, and to then require said receiver to report to this court fully touching what moneys remain in his hands after paying said dividend, and that he then be directed to proceed to collect from said Thomas Wolfe and from the other stockholders of said bank, who have not contributed to said fund, in the amounts named in said order, of April 25, 1901,

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the full amount of their stock liability for the use and benefit of the depositors and creditors of said bank." This motion was not supported by affidavits or other proof. That on July 2d, Judge Fawcett overruled this motion and at that time refused to hear oral testimony in support thereof.

On July 5th, following the overruling of the motion, the purported bill of exceptions was presented to Judge Fawcett with the request that he settle, sign and allow the same, but he refused to do so and assigned, as grounds for his refusal, that it was not a bill of exceptions and that the persons proposing the same were not entitled to a bill of exceptions. This proposed bill of exceptions contained nothing but three affidavits: The affidavit of V. O. Strickler, the joint affidavit of W. A. Corson and V. O. Strickler and the separate affidavit of W. A. Corson. Neither of these affidavits bears any filing mark, but the jurat of each shows that they were sworn to on July 3, 1901. Now then the question is, should affidavits that were not used on the hearing and not made until after the controversy was decided be brought into and made a part of the record by incorporating them into a bill of exceptions?

An affidavit is an *ex parte* statement, in writing, of facts, under oath, and may be used as evidence "to prove the service of summons, notice, or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." Section 370, Code of Civil Procedure. The function of a bill of exceptions is to bring into the record the facts on which the trial court decided the questions of law presented for review. It follows then that this will include only the facts that were presented to the trial court and upon which it acted by either considering or rejecting them. Facts not presented to it cannot be the subject of review in this court, for the reason that they have never been the subject of judicial consideration in the court below. It is the province of this court to review the acts which have been done by the trial court,

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but for reasons which are obvious we can not review that which has not been done by it.

For the reason that the affidavits contained in the proposed bill of exceptions were not presented to and considered by the court below on the hearing of the motion complained of, we conclude, that they cannot be considered in the event that the case is brought to this court for review and, therefore, should not be brought into the record by a bill of exceptions.

It is therefore recommended that the writ be denied.

SEDGWICK and POUND, CC., concur.

WRIT DENIED.

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CHADRON LOAN AND BUILDING ASSOCIATION, APPELLEE, V.  
HUGH B. O'LINN ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 12,291.

Commissioner's opinion. Department No. 1.

**Judicial Sales: FILING COPY OF APPRAISAL BEFORE SALE.** The provisions of section 491d of the Code of Civil Procedure, to the effect that a copy of the appraisement of real estate to be sold at judicial sale, inclusive of the applications to certain officers for certificates of liens and such certificates, shall be forthwith deposited in the office of the clerk of the proper court, are mandatory, and unless there is a compliance therewith prior to the advertisement of the notice of sale, any sale made may be vacated. *Globe Loan & Trust Company v. Wood*, 58 Neb., 395, followed.

APPEAL from the district court for Dawes county. Tried below before WESTOVER, J. *Judgment vacated.*

*F. M. O'Linn*, for appellants.

*Albert W. Crites*, contra.

KIRKPATRICK, C.

This is an appeal from an order of confirmation made by the district court for Dawes county. Among the objections filed to the confirmation of the sale was the follow-

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ing: "Because appraisal was not filed until after first publication of sale." The record discloses that the order of sale in question was received by the sheriff on the 10th day of January, 1901, and on the same day the sheriff appraised the property as required by law. The sheriff failed to file a copy of this appraisal in the office of the clerk of the district court until the 21st day of January, and not until after two publications of the notice of sale had appeared in a newspaper. The first notice was published January 11, 1901, and the sale was set for February 25, 1901. After the objections to the confirmation had been filed, a paper purporting to be an amended affidavit of publication was filed in the office of the clerk of the district court, showing that the first publication of notice was on the 25th day of January, 1901. Two affidavits of the publisher, showing the publication of the notice, appear in the record, neither of which is attached to or made a part of the sheriff's return to the order of sale, and neither of which is in any way referred to by the sheriff in his return. No amendment of the return was made, and as it appears in the record it recites: "Thereupon on the 11th day of January, A. D. 1901, I caused a notice to be published in the *Chadronian*, a newspaper printed and in general circulation in said county, that I would offer said lands for sale at the north front door of the court house in the city of Chadron, Dawes county, Nebraska, on the 25th day of February, A. D. 1901."

The fact seems to be that the sheriff published the notice of sale two weeks longer than was necessary. He began the publication on the 11th day of January and failed to file a copy of the appraisal until the 21st day of January. The so-called amended affidavit of publication consists in dropping out of the affidavit the first two publications of the notice made, and the publisher swears that the publication made January 25th was the first, and, no doubt, upon the strength of this affidavit, the trial court confirmed the sale. The theory of the court no doubt was that, inasmuch as the copy of the appraisal was filed on the 21st

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day of January, more than thirty days before the day of the sale, the publications of the notice prior thereto were wholly immaterial and could be disregarded and the sale confirmed.

We can not inquire further than to accept the sheriff's return which is quoted above as conclusive of the fact that the first publication was actually made on the 11th day of January. The statute requires that the sheriff, after making the appraisal, shall forthwith file a copy of the appraisal in the office of the clerk of the district court. In the case of *Burkett v. Clark*, 46 Neb., 466, this court said that "the word 'forthwith' found in section 491a of the Code means immediately; without delay; directly,—regard being had to the nature of the act required to be performed." Again in the same case this court said: "The object of the statute in requiring an officer to deposit the appraisal made, the application for liens, and the certificates of liens furnished, before advertising the sale, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised; to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisal before the sale occurs." Again, in the case of *Reuland v. Waugh*, 52 Neb., 358, this court said: "It is the duty of an officer making a sale of real estate under execution or order of sale to deposit in the office of the clerk of the court from which the writ issued a copy of the appraisal of the property and other papers as required by section 491d of the Code of Civil Procedure, and such duty must be performed prior to the advertisement of the sale." In the case of *Globe Loan & Trust Company v. Wood*, 58 Neb., 395, it is said: "The provisions of section 491d of the Code of Civil Procedure, to the effect that a copy of the appraisal of real estate to be sold at judicial sale, inclusive of the applications to certain officers for certifi-

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cates of liens and such certificates, shall be forthwith deposited in the office of the clerk of the proper court, are mandatory, and unless there is a compliance therewith prior to the advertisement of the notice of sale, any sale made may be vacated." In the case at bar, it appears from the record that the sheriff did not deposit a copy of the appraisal, as by law required, until after two weeks' publication of the notice. We are of opinion that this rendered his subsequent proceedings erroneous, and that they were not cured by extending the publication for thirty days after the filing of the copy of the appraisal. The objections to confirmation should have been sustained. It is therefore recommended that the order of the trial court confirming the sale be vacated and the case remanded.

HASTINGS and DAY, CC., concur.

The order of the trial court confirming the sale is vacated and the cause remanded.

JUDGMENT VACATED.





**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF NEBRASKA.**

**JANUARY TERM, A. D. 1902.**

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**PRESENT:**

**HON. J. J. SULLIVAN, CHIEF JUSTICE.**

**HON. SILAS A. HOLCOMB,  
HON. SAMUEL H. SEDGWICK, } JUDGES.**

**DEPARTMENT No. 1.**

**HON. WILLIAM G. HASTINGS,  
HON. GEORGE A. DAY,  
HON. JOHN S. KIRKPATRICK,**

**DEPARTMENT No. 2.**

**HON. JOHN B. BARNES,  
HON. WILLIS D. OLDHAM,  
HON. ROSCOE POUND,**

**DEPARTMENT No. 3.**

**HON. EDWARD R. DUFFIE,  
HON. JOHN H. AMES,  
HON. I. L. ALBERT,**

**COMMISSIONERS.**

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**EUGENE H. PEARSON, APPELLEE, V. BADGER LUMBER COM-  
PANY, APPELLANT, ET AL.**

**FILED JANUARY 8, 1902. No. 10,004.**

**Commissioner's opinion. Department No. 1.**

- 1. Mortgages: JUDICIAL SALES: OBJECTIONS TO APPRAISAL.** Where an appraisement of real estate has been duly made for the purpose of judicial sale, it can not be successfully attacked solely on the ground that the property has been appraised too low. To use the low valuation as a successful basis for attacking the appraisement, it must be alleged and proved that it was fraudulent. *Brown v. Fitzpatrick*, 56 Neb., 61.

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2. **Mortgages: JUDICIAL SALES: PURPOSE OF APPRAISAL.** The purpose of an appraisement of real estate for judicial sale is to fix a price below two-thirds of which no bids will be received.
3. **Mortgages: JUDICIAL SALES: CONCLUSIVENESS OF APPRAISAL.** The appraisers are by statute a summary tribunal to fix such price, and their action when duly taken under the statute can be impeached for fraud alone.
4. **Mortgages: JUDICIAL SALES: SETTING ASIDE A SALE IN EQUITY.** Such action of the appraisers does not deprive the court of any of its equity power to set aside a sale or to require that such sale be for an adequate price.
5. **Appeal and Error: JUDICIAL SALES: SETTING ASIDE: DISCRETION.** No abuse of discretion of the trial court, in refusing to set the sale aside is shown or complained of.

APPEAL from the district court for Lancaster county.  
Tried below before HOLMES, J. *Affirmed.*

*Frank Irvine, Tibbets Bros., Morey & Anderson and  
Chas. E. Magoon, for appellant.*

*S. L. Geisthardt, contra.*

DAY, C.

This is an appeal from a judgment of the district court for Lancaster county, confirming the sale of real estate made in pursuance of a decree of mortgage foreclosure. The property was appraised at \$8,700. Upon the filing of the appraisement with the clerk, the mortgagor filed objections to the appraisement on the ground that the value placed on the property was too low. This motion was overruled. After the sale of the premises a similar objection was interposed to the confirmation.

It is contended by the appellant that the value of the property as fixed by the appraisers was so far below its real and true value as to create the inference that the appraisement was fraudulent. As a basis for this contention a number of affidavits are referred to in the record wherein the property was valued at sums ranging from \$12,000 to \$25,000. There was no claim of any fraudulent or wrongful act on the part of the appraisers or of the

## Pearson v. Badger Lumber Co.

appellee, the sole objection being that the property was appraised too low. Where an appraisement of real estate has been duly made for the purpose of judicial sale, it can not be successfully attacked solely on the ground that the property has been appraised too low. To use the low valuation as a successful basis for attacking the appraisement, it must be alleged and proved that it was fraudulent. *Brown v. Fitzpatrick*, 56 Neb., 61; *Mills v. Hamer*, 55 Neb., 445. The value of a piece of property is largely a matter of opinion, and it is now the well established doctrine of this court that the appraisement cannot be successfully assailed merely because the appraisers were mistaken, or because they differed in their valuation from that of other witnesses. *Nelson v. Alling*, 58 Neb., 606; *Ecklund v. Willis*, 44 Neb., 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb., 601; *Brown v. Fitzpatrick*, 56 Neb., 61; *Ballou v. Sherwood*, 58 Neb., 20, 78 N. W. Rep., 383; *Lockwood v. Cook*, 58 Neb., 302, 78 N. W. Rep., 624; *Michigan Mutual Life Ins. Co. v. Richter*, 58 Neb., 463, 78 N. W. Rep., 932.

The purpose of an appraisement of real estate is to fix an upset price below two-thirds of which, no bids will be received. The legislature created a tribunal to fix such a price and it was never the intention that honest valuation placed upon property for purposes of judicial sale by legally qualified appraisers should be set aside except when impeached for fraud. *Wood v. Clark*, 58 Neb., 115. We adhere to the rule previously announced by this court that the upset price fixed by the appraisers is conclusive unless assailed for fraud or disqualification of the appraisers under the statute, or for some other equally potent reason. Such action of the appraisers does not deprive the court of any of its equity power to set aside a sale when made or to require that a sale shall be for an adequate price. If the result of a sale is a price so low that to uphold it would be inequitable and against good conscience the court should set it aside for such cause even though it be for two-thirds of the amount of the

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appraisement. Such action is and must necessarily be largely within the sound discretion of the trial court. We see in this case no abuse of discretion of the lower court in refusing to set the sale aside, and in the briefs and argument no such complaint is made.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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SWOFFORD BROS. DRY GOODS CO. v. J. F. COWGILL ET AL.

FILED JANUARY 8, 1902. No. 10,403.

Commissioner's opinion. Department No. 1.

**Partnership: LIABILITY OF PARTNER: SUBMISSION TO JURY: EVIDENCE.**  
Evidence examined and *held* sufficient to require submission to the jury of question of liability on the part of defendant in error, as partner, in the purchase of the goods for whose price the action was brought; and action of trial court in instructing for verdict for defendant therefore erroneous.

ERROR from the district court for Phelps county. Tried below before BEALL, J. *Reversed.*

*Rhea Bros. & Manatt and Ellis, Reed, Cook & Ellis, for plaintiff in error.*

*Clency St. Clair and G. Norberg, contra.*

HASTINGS, C.

The question in this case is the liability of the defendants, Norberg and J. F. Cowgill, for goods purchased by W. H. Cowgill and delivered to him under the name of J. F. Cowgill & Co. There is no evidence against J. F. Cowgill, except the fact that her husband bought these goods in her name and put a bank account in her name and drew checks on it in her name. There is no evidence against Norberg, except that of one of the attorneys for

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plaintiff, who testifies that in the year 1892, as agent for Dun & Co., he received an inquiry at Holdrege, Neb., as to the firm of Cowgill & Norberg, "while the business was carried on at Tobias," and called, he thinks, upon Mr. Norberg and in the conversation "it was stated that Mr. Norberg was connected with the business, and I so reported." This statement was made in answer to the question as to what the conversation was, and was stricken out by the court as not responsive. The question was repeated and the answer was, "My recollection is the best that I can give, that is that Mr. Norberg said they were carrying on the business down there, he and the Cowgills." It appears that from some time in May, 1892, until some time in November, of the same year, a bank account was kept in the name of Norberg, at Tobias; that the account was opened by W. H. Cowgill in that name and checked upon by him in that name, and in his own name, and in the name of J. F. Cowgill. It appears that goods were ordered by W. H. Cowgill in the name of G. Norberg, shipped to Tobias and delivered in that name to W. H. Cowgill. It appears that on Oct. 3, W. H. Cowgill in person purchased the goods sued for in this action, representing that J. F. Cowgill, his wife, and Norberg were partners in the transaction. It does not appear that either Norberg or J. F. Cowgill were during any of the time personally at Tobias, or had any connection with the transaction, except from these representations of W. H. Cowgill, and the testimony above stated. The court rejected all evidence of the transaction as to the purchasing of the goods as against the defendants, Norberg and J. F. Cowgill, and instructed the jury to return a verdict for these two defendants, and one against W. H. Cowgill for the price of the goods. This was done on the ground that no connection on the part of the defendants in error with the transaction was shown.

The sole competent evidence tending to show Norberg's liability as a partner in the transaction of the purchase of these goods is the statement of James I. Rhea above

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given. There is nothing else to show that W. H. Norberg was aware of the use being made of his name at Tobias, more than one hundred miles from his home. With considerable hesitation it has been concluded that in refusing to submit to the jury the question as to Norberg's liability as partner for these goods, the trial court erred, and that plaintiff is entitled to a new trial in this cause.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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THE NEWS PUBLISHING COMPANY ET AL. V. HECTOR H. TYNDALE, APPELLANT, IMPLEADED WITH TROILUS H. TYNDALE ET AL., APPELLEES.

FILED JANUARY 8, 1902. No. 10,437.

Commissioner's opinion. Department No. 1.

**Chattel Mortgage: NOTICE.** The fact that a chattel mortgage was withheld from record from January 17 to March 12, following, with intent to avoid injury to mortgagor's credit, does not render it fraudulent as against one whose first dealing with mortgagor was on April 8, afterwards, and who does not appear to have examined the chattel mortgage records during the transactions.

APPEAL from the district court for Lancaster county. Tried below before CORNISH, J. *Reversed and intervention dismissed.*

*Jno. P. Maule*, for appellant.

*E. F. Pettis*, contra.

HASTINGS, C.

In this case there seem to be two questions: first, as to the right of the intervener and cross-petitioner, The

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Brown & Clark Paper Co., to come into this action and set up here its claim as against the defendant, Hector H. Tyndale, to have its judgment against the News Publishing Co. satisfied by him; second, whether the evidence supports the finding of the trial court that the mortgage held by Hector H. Tyndale against the News Publishing Co. was fraudulent and void as against that company's creditors, and especially as against the intervener, and the latter, consequently, entitled to a satisfaction of its judgment out of the mortgaged property.

On December 16, 1896, the News Publishing Company, and Sam E. Low and Hans T. Westerman, stockholders, filed a petition in the Lancaster county district court to enjoin a sale of the entire plant and good will of the News Publishing Co., which was advertised to take place on that day by Hector H. Tyndale as mortgagee. The injunction was sought mainly on the ground that in consideration of an assignment of all the stock of the company and delivery of possession of its plant to one Troilus H. Tyndale, the mortgagee had agreed that the debt should be extended until September 1, 1897. On December 21 the defendants, Hector H. Tyndale and Troilus H. Tyndale, answered denying the allegations of the extension agreement and setting out another and different one whereby the possession of the plant was turned over to the defendants for the purpose of a foreclosure of the chattel mortgage. On December 22, the Brown & Clark Paper Co. filed a petition of intervention setting out its recovery on December 8, 1896, in the county court of Lancaster county of a judgment against the News Publishing Co., for \$323.28, and costs of \$7; that this judgment was still in force and execution upon it had been issued and returned *nulla bona*; that it was rendered upon an indebtedness incurred by the publishing company before March 12, 1896, the date of the recording of Tyndale's mortgage; that the intervener at the time of the furnishing of the goods had no knowledge of the mortgage; that the goods were used for the publication of the newspaper and with the full

knowledge and consent of the mortgagee; that the mortgagee was in fact the owner of the entire plant and stock of the company before taking possession of it, and his mortgage merged; that his mortgage was void, because not properly executed and withheld from record until after the intervener had become creditor, and never recorded as required by law; that it covered property not subject to chattel mortgage; that the mortgagee permitted the mortgagor to remain in possession of the property and dispose of it in the usual course of business; that the News Publishing Co. was insolvent, and that the mortgagee was about to convert the property into money. Sometime subsequently an amendment was made charging that the directors and stockholders of the News Publishing Co. were sureties upon the indebtedness to Tyndale, which the mortgage was given to secure, and the mortgage was therefore void. Also alleging that there had been a previous finding that the goods were furnished to the mortgagee; that the paper company had no remedy at law and were entitled to an accounting; that the value of the property was over \$12,000, and that such finding and decree were binding upon Tyndale.

May 9, 1898, Hector H. Tyndale answered this petition of intervention, that it did not state facts enough to constitute a cause of action against him; that he had loaned the publishing company \$6,000 which was represented by three promissory notes, secured by the mortgage in question, which bore date of January 17, 1896; that on March 12 the mortgage was filed for record; that September 22, with the consent of the officers and stockholders of the publishing company he took possession of the property, and on April 26, 1897, sold it under the mortgage as provided by law and bought it in himself at \$6,000; that the Brown & Clark Paper Co. became creditors of the publishing company long after the filing of the mortgage, and had notice of it; that the intervener had no lien on the property by mortgage, levy, garnishment, or otherwise; that the property could have been levied upon, and that



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the intervener's petition discloses no right on its part to intervene in the action. The action on the part of plaintiffs in the meanwhile had long previously been dismissed. The trial court found the intervener's judgment was rendered as alleged; execution on it issued and returned; that it was still in force; that the entire property of the publishing company had been seized under the mortgage and disposed of by Tyndale; that it was at all times worth more than the amount of the judgment and costs; that the mortgage was for money loaned as alleged; that when it was given the officers of the publishing company expected it would not be filed immediately but kept from the knowledge of the public and its creditors; that while no agreement was made by Tyndale to that effect, he knew of such expectation and shared in the intent; that the mortgage was kept from the record from January 17 to March, 1896, to prevent the public and creditors from knowing of its existence and with the intent to aid the publishing company in continuance of its business and dealings with its creditors, and that such intent of Tyndale's was fraudulent as to the publishing company's creditors, and the mortgage therefore void, as to the paper company. Decree was entered against Tyndale for the amount of the judgment against the publishing company, and the costs of this action, and execution awarded. From this decree is the appeal.

Beyond all doubt, if Tyndale's mortgage was fraudulent and void as found by the court, it was competent in a proper proceeding to charge him, as trustee through his own wrong of the property of the publishing company, with the payment of the judgment against it. The question remains, what right had the paper company to come into this action or interfere with its progress. It is true that the paper company had a judgment against the publishing company, which was unsatisfied and on which an execution had been returned *nulla bona*. This, however, did not give to the paper company any lien upon or interest in any specific personal property. It seems to be well

enough established that the right of intervention is reserved for those who have a distinct legal interest in the subject-matter of the action and in the result of the litigation. *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb., 137. In this case, it is difficult to see what interest the intervenor had in the question as to whether or not the publishing company and its officers should be able to prevent the sale. The property was in the hands of the mortgagee and had been since the preceding September. It is true that if the mortgage was fraudulent Tyndale was chargeable as trustee with the property or its proceeds, and his agents in whose possession it was could have been garnished. It is probable, however, that objection to the proceeding by intervention was waived by answering to the merits and by taking this appeal. The objection taken is not to the jurisdiction of Tyndale's person, but to the sufficiency of the facts alleged to establish a right of recovery as to him. The record fails to disclose any objection made or exception taken to the allowance of the filing of intervenor's petition or any objection before answering to the merits, and the objection in the answer accompanied by a plea to the merits without any previous objection would seem too late.

The question as to the sufficiency of the evidence to sustain the finding of the trial court remains. As above stated the trial court finds that the mortgage was made on January 17, 1896, and was withheld from record until March 12, 1896. The allegation of intervenor's petition was that the goods for which the judgment was rendered were furnished before this recording and without knowledge of the existence of the mortgage. The record by no means bears out this plea. It seems from the evidence that the goods were ordered by the publishing company on April 8, and were furnished on April 28, a month and a half after the recording of the mortgage. No question is raised as to actual loaning of the money, and the court finds that the defendant advanced it. The mortgage was on record and unless an intent to do a harm which never

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happened, so far as any evidence taken in this case discloses, is sufficient to deprive the defendant of the security taken for money actually advanced, then there was no fraud on his part, and there can be no recovery by the intervenor.

Granting that the evidence shows all that the court finds, viz., that from February 17 until March 12, the defendant, Tyndale, held this mortgage off the records without any definite agreement to that effect in order to avoid injury to the publishing company's credit, does that avail to render the mortgage fraudulent as to this debt for merchandise ordered by the publishing company on April 8 and delivered on April 28? It must be remembered that there is nobody here objecting to this mortgage, except the Brown & Clark Paper Co. There is no creditor in existence whose claim accrued during the time the mortgage was not of record, so far as the evidence in this case discloses. It does not appear as far as our examination discovers that the Brown & Clark Paper Co. had any prior dealings with the publishing company, and certainly not that it ever caused any examination of the records for chattel mortgages during the time that this one remained unrecorded. It even appears affirmatively that this transaction of April 8 was the first one had between the parties. Evidently, so far as the intervenors are concerned, or any one else on this showing, no possible harm resulted from this mortgage not being recorded from January 17 to March 12. That being the case, it is impossible to see how the intent to save the credit of the publishing company, if it existed on the part of defendant, Tyndale, can be claimed as a ground of recovery by the intervenor in this case.

It is therefore recommended that the judgment of the district court be reversed, and the petition of intervention dismissed.

DAY and KIRKPATRICK, CC., concur.

Rohrer v. Fassler.

The judgment of the district court is reversed and the petition of intervention dismissed.

REVERSED AND INTERVENTION DISMISSED.

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M. F. ROHRER V. CHRIS FASSLER.

FILED JANUARY 8, 1902. No. 10,602.

Commissioner's opinion. Department No. 2.

**Taxation: FORECLOSURE OF LIEN: SALE OF TRACTS SEPARATELY.** Sales of real estate upon foreclosure of tax liens should be, as far as practicable, the same as upon mortgage foreclosures, and unless the decree provides otherwise the tracts or lots must be appraised and sold separately.

ERROR from the district court for Webster county. Tried below before BEALL, J. *Reversed.*

*Wharton & Baird*, for plaintiff in error.

*A. M. Walters, contra.*

SEDGWICK, C.

This is a proceeding in error to review an order of the district court for Webster county confirming a sale of real estate on a decree of foreclosure of tax liens. The petition upon which the decree was entered contains more than forty counts, each stating a cause of action for the foreclosure of tax liens upon the real estate described in each count respectively; so that more than forty different causes of action are united in the same petition. On the 15th day of January, 1897, trial was had with a general finding in favor of the plaintiff and a decree against all of the various tracts of real estate described in the petition (except one lot which seems to have been excepted from the decree), for the sum of \$1,261.22, and attorney fees and costs. The order of sale follows the decree, and directs the sale of the various tracts of real estate without

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providing that they shall be sold separately; and the sheriff's return shows that he sold the real estate in a body to the plaintiff, Chris Fassler, for \$1,465.70. Afterwards, on the 9th day of May, 1898, the defendant filed a motion to set aside the sale. Of the grounds urged in this motion, one is too indefinite to be considered; the second is not now insisted upon, and the third, fourth and fifth are that the lots were not appraised separately; that they were not offered for sale separately, and that they were not sold separately. This motion was overruled, and the sale confirmed. The errors alleged in the petition in this court are, that the district court erred in overruling the motion of the defendant to set aside the sale; and that the district court erred in permitting the lots to be sold in bulk, and refusing to sustain the objections of the plaintiff in error, and in failing to require the appraisal and sale of the lots separately.

The decree was erroneous in not fixing the amount chargeable to each lot respectively; but this error the defendant (now plaintiff in error) waived, and did not complain thereof in his objection in the district court, nor does he now in his petition in this court. The decree of the court should stand, but can the sale be sustained under this decree? We think not. The statute provides that upon foreclosure of tax liens the "tract or lot" shall be sold in all respects, as far as practicable, as though the same were a mortgage. Section 179, Revenue Act. Section 860 of the Code provides that "If \* \* \* it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the decree shall, in the first instance, be entered for the sale of the whole premises accordingly." Where there is no such finding and decree the tracts or lots must be appraised and sold separately. *Laughlin v. Schuyler*, 1 Neb., 409. There was no such finding and decree in this case, and the sheriff should have sold the tracts and lots separately. The objection to the sale was made in due time and should have been sustained.

Shelby v. Creighton.

It is recommended that the order of the district court confirming the sale be reversed, and a new sale ordered.

OLDHAM and POUND, CC., concur.

REVERSED AND REMANDED.

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MARY B. SHELBY V. JOHN A. CREIGHTON.

FILED JANUARY 8, 1902. No. 10,632.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ERROR MUST BE SHOWN AFFIRMATIVELY.** A plaintiff in error must show affirmatively that error was committed and that he was entitled as a matter of law to a different judgment or order from that complained of.
2. **Judgments: FINDINGS: MODIFICATION.** Where the findings show a narrower liability than that enforced by the judgment of the court, or show no liability and the judgment enforces one, or in any other way a discrepancy between findings and judgment is presented which no possible state of the pleadings could justify, modification or reversal may be had upon a record showing such findings and judgment only.
3. **Judgments: FINDINGS: MODIFICATION.** But where the ground of complaint is that the findings of themselves would entitle the plaintiff in error to more relief than was granted, a record containing the findings and judgment only is insufficient to procure modification or reversal, since the prayer of the petition may have been more limited than the relief warranted by the facts alleged and found.
4. **Contracts: LIMITATION IN EQUITY.** If a contract is so broad in its language as to cover matters of which the parties were ignorant, equity may confine its application to the real purposes of the bargain.

ERROR from the district court for Douglas county.  
Tried below before SCOTT, J. *Affirmed.*

*Wm. D. Beckett* and *J. W. Woodrough*, for plaintiff in error.

*Woolworth & McHugh*, contra.

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POUND, C.

The record before us contains only the decree of the lower court. Error is assigned upon the decree itself, the plaintiff in error seeking to secure its modification, to quote from the brief of counsel, so as to make it "conform to and be consistent with itself." We have no doubt that there are cases where a decree on its face is so erroneous that the court would reverse or modify it upon mere view thereof without further record. Thus, if there were findings that a conveyance was made to a *bona fide* purchaser for value, followed by a decree that it be set aside as fraudulent, or a finding upon an accounting that the one party owed the other \$1,000, followed by a decree awarding the latter \$2,000, our duty would be clear. No pleadings and no record of any kind beyond the decree itself would be necessary to enable us to say beyond peradventure that the decree was erroneous and required reversal or modification. But it does not follow that every case of inconsistency or discrepancy between the findings and the decree demands such action at our hands. The decree must not only conform to the findings, but it must be in accordance with the pleadings as well. If, for example, the petition prays judgment for \$1,000 and the court finds that \$2,000 are due, its judgment for the former sum is not erroneous. In such a case, if the decree alone came before us, surely we should not allow any presumption that the plaintiff had prayed for all that was due him to move us to interfere with a legal and proper judgment. One has only to glance at the reports to see that remittitur is ordered frequently because a plaintiff has failed to demand all that a court or jury found he might have claimed. A plaintiff in error must do more than show possible error. He must show clearly that the judgment or order complained of is and must be erroneous, and that he was entitled as a matter of law to a different ruling. To show that the findings of the court, of themselves, would permit or even require more relief than was granted is only to

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show a possibility of error. Before we can say that there was error, we must see the pleadings and ascertain that they would allow the full measure of relief required by the findings. If the findings show a narrower liability than that enforced by the decree, the case is otherwise, for no pleading of any sort can justify recovery of more than the court finds to be due. Counsel have attempted with much ingenuity to reconstruct a petition from the several findings of the court, and we may admit that the findings indicate to a high degree of probability the kind of petition they claim to have presented. But we do not think their conclusion irresistible. It is a principle of not infrequent application that where a contract is so broad in its language as to cover matters of which the parties were ignorant, equity may confine its application to the real purposes of the bargain. *Farewell v. Coker*, 2 Mer. [Eng.], 353; *Ramsden v. Hylton*, 2 Ves. [Eng.], 304, 309; *Lumley v. Wabash R. Co.*, 76 Fed. Rep., 66. This principle may have been the basis of the prayer of plaintiff's petition. The decree is in complete accordance with it, and the facts found are such as to call it into operation. It is true the court makes findings consistent with a prayer of much wider scope. We do not regard this as conclusive. It is by no means uncommon for courts to go beyond the issues in their findings nor is it impossible for able counsel to overlook matters of great moment in the prayer of their pleadings. The most that can be said is that the decree in question presents a strong appearance of error. It is not necessarily erroneous, and its true character can only be known to those who have access to a petition as to which we can but conjecture. A similar case was before this court in *Calmelet v. Sichel*, 54 Neb., 97.

It is recommended that the decree be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

Opinion on rehearing follows.



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MARY B. SHELBY V. JOHN A. CREIGHTON.

FILED NOVEMBER 6, 1902. No. 10,632.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: WHEN FINDINGS OF FACT PRESUMED TRUE.** Where the evidence is not preserved and a transcript of the pleadings is not presented, it will be conclusively presumed in the appellate court that the findings of fact of the trial court are true.
2. **Executors and Administrators: PURCHASE OF HEIR'S INTEREST: BONA FIDES.** An administrator occupies a fiduciary relation to the heir of his intestate, and where by contract with the heir such administrator purchases the heir's interest in the real estate of his intestate, the transaction will be rigidly scrutinized by a court of equity. However, if the transaction is in good faith and wholly without fraud, it may be treated as similar transactions between strangers.
3. **Executors and Administrators: PURCHASE OF HEIR'S INTEREST: MISTAKE IN DESCRIPTION: CORRECTION IN EQUITY.** Where, in such case, the contract by mutual mistake is made to convey more than was intended or in the contemplation of the parties thereto, a court of equity may reform the contract to conform to the intention of the parties.

REHEARING of case reported *ante*, page 264.

ERROR from the district court for Douglas county. Tried below before SCOTT, J. *Judgment below reaffirmed.*

*Wm. D. Beckett* and *J. W. Woodrough*, for plaintiff in error.

*Woolworth & McHugh*, contra.

KIRKPATRICK, C.

This case is brought to this court upon error from Douglas county, and a reversal is sought of a decree of the district court modifying in part a contract made between Joseph Creighton and John A. Creighton, who were brothers, for the sale of certain lands, inherited from Edward Creighton, a deceased brother. An opinion was filed in this case at a prior term of this court (January 8,

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1902), and is reported *ante*, page 264. Upon application of plaintiff in error, a rehearing was allowed. The only record brought to this court consists of the findings and decree of the trial court, the record containing neither a bill of exceptions nor a transcript of the pleadings. In this condition of the record the only question which can be determined is whether the judgment is in accordance with the findings, and whether the several parts of the decree are consistent with each other. The trial court found that on the 5th day of November, 1874, Edward Creighton died without issue and intestate, seized of certain premises, only a portion of which are described in the decree, leaving as his heirs at law two brothers and the children of a deceased brother. It further appears from the findings of the trial court that John A. Creighton, defendant in error, was appointed administrator of his brother's estate, and that he filed an inventory of his brother's estate in the probate court of Douglas county, from which was omitted, apparently by mistake, a large tract of land situated in Douglas county. It further appears by the findings that John A. Creighton as administrator purchased from his brother Joseph the latter's undivided interest in all the lands of which his brother died seized, paying therefor the sum of \$30,000. It appears that Joseph Creighton executed deeds of conveyance covering his share of the lands so far as the property was at that time known, and that he also agreed in writing to convey his interest in any lands that might subsequently be discovered. This agreement he seems to have carried out, dying many years thereafter, leaving plaintiff in error, a daughter, as his sole heir at law. The trial court further found that Joseph Creighton, at the time he entered into the contract with his brother John A., was of sound and contracting mind, and that he had full information of all the lands of which his brother died seized, except the tract which had been omitted from the inventory, and that John A. Creighton was guiltless of all fraud or undue means in procuring the contract with

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Joseph. The trial court adjudged that the title to the land which was not described or included in the inventory did not pass to John A. Creighton, but remained the property of Joseph, or his heir, plaintiff in error, and decreed that John A. Creighton held the title to such lands in trust for plaintiff in error, and by the decree he was directed to convey such lands to plaintiff in error.

It is contended on the part of plaintiff in error that John A. Creighton held a fiduciary relation to Joseph Creighton, and that occupying this relation, he was forbidden to make the purchase mentioned, and that his failure to describe the inventory was a fraud which vitiated and voided the entire contract; and further, that the trial court, having sustained this contention as to the land omitted from the inventory, should have set aside the conveyance as to all other lands. The failure of the trial court to take this action is the only error assigned or complained of.

We are utterly unable to determine from the fragment of the record brought to this court the nature of the pleadings filed by plaintiff in error, or what relief was demanded. We have no means of knowing whether plaintiff in error sought a rescission of the entire contract, or merely sought a reconveyance of that portion of the property omitted from the inventory, as not being within the knowledge or contemplation of the parties when the contract was made. It may be conceded that certain findings of the trial court tend to give color to the theory of plaintiff in error that the petition sought a rescission of the entire contract, and it is upon this theory that counsel for plaintiff in error base their contention that the trial court in avoiding the contract as to the property not discovered in the inventory, should have voided the contract in toto, because of the fiduciary relation subsisting between vendor and vendee. But we are firmly of the opinion that any such inference, seemingly warranted by some of the language employed by the trial court, would fall far short of that affirmative showing of error required by the

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well settled rule in this court that error must affirmatively appear, and can not be aided by presumptions.

We are well aware that transactions such as that under consideration, occurring between administrator and heir, are subjected to close scrutiny by the courts, and if tainted by fraud or concealment, however slight, will be set aside. But in the case at bar, it must be conclusively presumed that there was no fraud on the part of John A. Creighton, the absence of fraud being found as a matter of fact by the trial court. We have, then, this situation: two parties capable of contracting, one the administrator, the other the heir; a contract between them by which the heir conveys his interest in a large amount of property to the administrator, and the latter pays a large sum of money for such interest; a finding from which it may be inferred that both parties labored under a mistake as to certain property owned by the vendor or heir, and a decree of a court of equity that the title to the undiscovered property passed to the vendee in trust, and was so held by him for the benefit of his vendor's heirs, with directions to the vendee to convey such property to the vendor's heir.

The contention of plaintiff in error is that the relief actually granted by the trial court under this state of facts is tantamount to a finding that the contract between these brothers, the one heir and the other administrator, was *per se* void, because it is found that there was an omission from the administrator's inventory of a portion of the deceased brother's estate; that this omission, without reference to the manner in which it occurred, must be held to vitiate the contract *in toto*. We do not think the rule goes to the extent contended for. In the absence of all fraud, misrepresentation, or intentional concealment, as in this case, a transaction like that under consideration may be permitted to stand as similar transactions between persons sustaining the relation of strangers to each other. And if by mistake the grantor conveyed more than was in the contemplation of either

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party, it would seem that equity has power to conform the contract to the intention of the parties thereto, directing a reconveyance of that portion not intended to be conveyed.

In Story, Equity Jurisprudence [13th ed.], section 154, it is said: "Courts of equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness."

3 Pomeroy, Equity Jurisprudence, section 1376, in discussing the same subject, says: "This subject has already been treated under the head of mistake, and little more need here be said. Equity has jurisdiction to reform written instruments in but two well-defined cases: (1) Where there is a mutual mistake,—that is, where there has been a meeting of minds—an agreement actually entered into—but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto."

So in the case at bar, we can not see why the trial court could not properly and correctly find that the real contract entered into between Joseph and John A. Creighton was that the former should sell and the latter buy the interest of Joseph in his deceased brother's real estate so far as that interest was at the time known to them; and that John A. having by the conveyance succeeded in getting possession of an additional amount of property, not within the contemplation of either party to the contract, and at the time unknown to Joseph, he should in equity be required to reconvey such additional property either to Joseph or his heirs. And the trial court, having power to enter such a decree, it must be presumed, in the absence of a transcript, that such decree was properly entered upon the pleadings. We have given

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a careful consideration to the question presented, and can not say that error affirmatively appears in the record before us. It is, therefore, recommended that the former opinion be adhered to, and that the judgment of the trial court be affirmed.

HASTINGS and DAY, CC., concur.

JUDGMENT BELOW REAFFIRMED.

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PHOENIX INSURANCE COMPANY OF HARTFORD, CONNECTI-  
OUT, v. CARL BOEHL ET AL.

FILED JANUARY 8, 1902. No. 10,667.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: EQUITY AND CONSCIENCE ABSENT FROM BILL.**  
Where a bill discloses nothing of equity and still less of conscience a judgment of the lower court dismissing such bill will be affirmed.
2. **Appeal and Error: EVIDENCE.** Evidence examined and *held* sufficient to sustain the judgment of the district court.

ERROR from the district court for Harlan county.  
Tried below before BEALL, J. *Affirmed.*

*Geo. W. Wright*, for plaintiff in error.

*R. L. Keester* and *J. G. Thompson*, contra.

OLDHAM, C.

This was a suit in equity to set aside an order of confirmation of sale in a mortgage foreclosure proceeding entered by the district court for Harlan county, Nebraska, on the 20th day of May, 1896. The petition is quite lengthy, and, if it contains anything at all that would entitle plaintiff to equitable relief it arises from the allegation of fraud and imposition charged to have been practised upon the court by defendants, Claypool and Cramer, in procuring the order sought to be set aside. There is nothing in the petition that clearly discloses the manner in which plaintiff was injured by the order

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which it seeks to have set aside. The defendants, Cramer and Claypool, answered this petition denying that the order of confirmation was procured by fraud or misrepresentation, but alleged that it was made by the agreement of all the parties in the presence of the court in accordance with a contract entered into between plaintiff and defendants and no exception was taken to the order when made by plaintiff's attorney who was then present. The testimony introduced at the hearing shows clearly and unmistakably that the order complained of was entered into in open court by the agreement of counsel of plaintiff and both defendants and that it was made in conformity to an agreement entered into by the plaintiff and the defendant, Claypool, who was the owner of the equity of redemption of all the mortgaged premises except one lot which was owned by the defendant, Cramer. The evidence showed that under this agreement the sale was to be confirmed on all the mortgaged property except lot 1, and that lot 1 was to be released in consideration of \$500, which was paid by defendant, Cramer, to the plaintiff for such release and that after confirmation that the plaintiff was to quit-claim the premises, with the exception of lot 1, to defendant, Claypool, in consideration of his paying the full amount of plaintiff's claim including all interest and costs of suit. The evidence shows clearly that after the confirmation was entered this agreement was carried out and plaintiff quitclaimed the land with the exception of lot 1 to defendant, Claypool, and received in consideration therefor the full amount of their claim, with interest and costs. The court found the issues for the defendants and dismissed plaintiff's petition and plaintiff brings error to this court.

As we view it this record discloses little of equity and still less of conscience in this proceeding, and we therefore recommend that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

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## ROBERT McCARTY ET AL. V. MARY E. MORGAN.

FILED JANUARY 8, 1902. No. 10,685.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: NEW TRIAL: MOTION FOR: INDIVISIBLE.** Where two or more parties join in a motion for a new trial the motion is indivisible and unless it should be sustained as to all it must be overruled as to all.
2. **Replevin Action Without Possession of Property: FORM OF JUDGMENT.** Where plaintiff begins an action of replevin and fails to procure possession of the property sued for, but continues the action as one for damages, an alternative judgment for the return of the property or its value is not required.

ERROR from the district court for Sheridan county.  
Tried below before WESTOVER, J. *Affirmed.*

*Frank J. Kelley*, for plaintiffs in error.

*C. Patterson and W. W. Wood*, contra.

OLDHAM, C.

This was an action of replevin originally instituted before a justice of the peace and taken by appeal to the district court for Sheridan county, Nebraska. It was stipulated that plaintiff was unable to procure possession of the property, and the action by agreement proceeded as one for damages. Plaintiff had judgment below and defendants bring error to this court.

The alleged errors called to our attention in the brief of plaintiffs in error arise largely from a misconception of the record. It is first contended that the court erred in not dismissing the plaintiff's appeal because no appeal undertaking was filed within ten days of the trial in the justice's court. The record shows that the trial was had in the justice's court on the 12th day of February, 1897; that an appeal undertaking was filed and approved on the 18th day of February, 1897, and that a transcript was filed in the office of the clerk of the district court for



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Sheridan county, Nebraska, on the 26th day of February, 1897. This then was sufficient to invest the district court for Sheridan county, Nebraska, with jurisdiction of the subject-matter of the controversy. It is true that the record shows that on suggestion of a diminution of the record by the defendants below they were permitted to file a corrected and supplemental transcript on the 7th day of October, 1897; but the filing of this amended transcript did not divest the district court of the jurisdiction it had acquired over the subject-matter of the controversy.

It is next contended by counsel for plaintiffs in error that there is not sufficient evidence to sustain the judgment against defendant, Robert McCarty, although there may be sufficient to sustain the judgment against his co-defendant, the Enlow Cattle Company. If this contention is well founded it is unfortunate that the two defendants filed a motion for a new trial jointly in the court below, for it is the established rule that where two or more parties join in a motion for a new trial the motion is indivisible and unless it should be sustained as to all it must be overruled as to all. *Minick v. Huff*, 41 Neb., 516; *Gage v. Bloomington*, 37 Neb., 699; *Scott v. Chope*, 33 Neb., 41.

The next objection raised is that the judgment was not in the alternative; but where an action in replevin is instituted and the plaintiff fails to obtain possession of the property replevied and prosecutes the action as one for damage there is no reason for an alternative judgment.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

*Solack v. Ganson.*

JACOB SOLACK ET AL. V. OSCAR B. GANSON, ADMINISTRATOR  
OF THE ESTATE OF BARBARA GANS, DECEASED.

FILED JANUARY 8, 1902. No. 10,687.

Commissioner's opinion. Department No. 3.

**Appeal and Error: JUDGMENT FOR COSTS: FINAL ORDER.** A mere judgment for costs is not a final judgment and proceedings in error will not lie to reverse such judgment.

**ERROR** from the district court for Douglas county. Tried below before BAKER, J. *Petition in error dismissed.*

*Arthur E. Baldwin and John H. Grossman,* for plaintiffs in error.

*Covell & Winter and G. W. Covell, contra.*

ALBERT, C.

This case is here on error. The judgment complained of was rendered in an action brought on an appeal bond, and is a judgment for costs only. It has been repeatedly held by this court that a judgment for costs is not a final judgment and that proceedings in error will not lie therefrom. A want of jurisdiction would render an examination of the questions raised fruitless.

We recommend that the petition in error be dismissed.

AMES and DUFFIE, CC., concur.

PETITION IN ERROR DISMISSED.

Omaha Brewing Ass'n v. Tillenburg.

THE OMAHA BREWING ASSOCIATION V. HERMAN TILLENBURG.

FILED JANUARY 8, 1902. No. 10,739.

Commissioner's opinion. Department No. 2.

**Appeal and Error: SUFFICIENCY OF PETITION AND EVIDENCE: PRESUMPTIONS.** Where a cause is tried to the court and there is a general finding for the plaintiff, if any cause of action is stated and there is evidence thereon sufficient to sustain the finding, it will be presumed that the court proceeded thereon and the judgment will be affirmed, although the petition attempts also to state a cause of action of a different nature which would not sustain a recovery.

ERROR from the district court for Madison county.  
Tried below before ROBINSON, J. *Affirmed.*

*Allen & Reed*, for plaintiff in error. .

*Powers & Hays, contra.*

POUND, C.

The petition alleges, in substance, that the plaintiff, Tillenburg, sold and delivered to the Omaha Brewing Association, defendant, certain saloon furniture, bar fixtures and stock, and as part payment took the promissory note of one Semler for \$625 which the defendant procured to be executed; that the note is past due and unpaid, that the defendant upon request has failed to pay it, and that it cannot be collected of Semler, who is insolvent. It is further alleged that at the time of the sale the defendant agreed to secure the Semler note and did secure it by giving a lien on the property sold, evidenced by a written agreement recited in the petition and hereinafter described; that afterwards the defendant took possession of said property and sold it without plaintiff's consent and converted the proceeds, and that the property was of the value of \$1,000. The written agreement referred to, after reciting the acceptance of the Semler note as

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part payment, provides that "if said Semler fails or refuses to pay said note or any part thereof \* \* \* said Tillenburg shall be secured by the contract between the Omaha Brewing Association and H. Semler, in the same way as the Omaha Brewing Association, according to their respective claims." It is not easy to say from this petition nor from the brief of counsel for Tillenburg, whether it is intended to state a cause of action for conversion of property upon which the latter had a lien or for recovery of the balance of the purchase price, the note, taken as conditional payment, being uncollectible. The plaintiff in error takes the former view, and if such is the theory on which the judgment was rendered, we do not think it can stand. There is no allegation that there was any contract between Semler and the defendant nor as to the manner in which defendant was secured. The agreement recited provides that plaintiff and defendant shall be secured "in accordance with their respective claims," evidently contemplating an apportionment of the security *pro rata*. But it is not alleged whether there was or was not money owing from Semler to the association, nor is there anything to show to what portion of the whole security plaintiff was entitled. It is very doubtful, therefore, whether the petition, as far as any cause of action for conversion is concerned, will sustain the judgment rendered. However this may be, the evidence is clearly insufficient. The defendant's agents and officers deny positively that they ever had any contract or agreement with Semler by way of security, or any other security. Semler testifies vaguely to some sort of instrument, but his testimony is confused and uncertain, not only as to its terms and nature, but as to its very existence. It appears that Semler owed the defendant \$500 or \$600 at the time of the alleged conversion, and as the property did not bring much more than this, if the defendant had held a mortgage or lien of some sort, plaintiff, under his agreement, could only have benefited in proportion to the "respective claims," which would not permit re-

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covery of much more than half the sum awarded him. But we do not think this the only possible view as to the nature of the cause of action. Trial was had to the court, and a general finding was rendered for the plaintiff. Hence we cannot be certain on what theory the judgment proceeds. If any cause of action is stated and there is evidence thereon sufficient to sustain the findings and judgment, the presumption is that the lower court proceeded upon it, and it is our duty to affirm such judgment. The allegation of further facts tending to show a distinct cause of action of another nature, so long as no motion was made for separate statement and no questions as to misjoinder are now before us, would not be material. A good cause of action is stated for the balance of the purchase price. A sale to the defendant is alleged, the taking of the Semler note in part payment, and the non-payment thereof and insolvency of Semler. Obviously the note, executed, as it is alleged, at the procurement of defendant and taken under the express agreement to see it paid, was only conditional payment, and if it remained unpaid, plaintiff could recover on the original indebtedness. *National Life Ins. Co. v. Goble*, 51 Neb., 5. We do not see that any additional allegations were needed to show a cause of action of this sort. The evidence as to who was vendee in the sale is conflicting, but sufficient to sustain a finding for plaintiff. Defendant's agent testifies, and he is corroborated by one of the chief officers of the association, that plaintiff sold directly to Semler and that defendant's agent merely assisted in getting the purchaser and in conducting the negotiations. The plaintiff testifies positively that he sold to the defendant; that the defendant put Semler in under some agreement of its own with the latter; that he refused to take Semler's note or look to Semler; and that defendant's agent told him he could rely on the association for his money and that it would allow him the benefit of the security given it by Semler. Semler's evidence is inconclusive and uncertain, but much of it goes

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to corroborate plaintiff. Two other witnesses, present at the negotiations, testify that the defendant, not Semler, was vendee. The language of the agreement appears to indicate the contrary, and there are circumstances on both sides. Taking the testimony as a whole, we think a trier of fact might fairly find that there was a sale to the defendant, that the Semler note was taken in conditional payment, and, as that note is uncollectible, that plaintiff should recover. The petition, as has been seen, set up facts sufficient to permit recovery on such finding. The only errors argued are that the petition fails to state a cause of action and that the finding and judgment are contrary to the evidence. We are not bound to examine the other assignments. It is therefore recommended that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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THE OMAHA BREWING ASSOCIATION V. HERMAN TILLENBURG.

FILED OCTOBER 22, 1902. No. 10,739.

Commissioner's opinion. Department No. 3.

**Pleading:** PART PAYMENT BY THIRD PARTY: SUFFICIENCY OF PETITION.

The facts stated in the petition set out in the opinion, *held*, insufficient to constitute a cause of action.

REHEARING of case reported *ante*, page 277.

ERROR from the district court for Madison county. Tried below before ROBINSON, J. *Former opinion set aside and judgment below reversed.*

*Allen & Reed*, for plaintiff in error.

*Powers & Hays*, contra.

ALBERT, C.

This case is before us on rehearing. The former hearing was before another department, whose opinion was filed January 8, 1902, and reported *ante*, page 277. In the district court, there was a finding and judgment for the plaintiff (the defendant in error). The defendant brings error.

The principal question presented by the record is whether the petition, filed in the district court, states a cause of action. The petition is as follows:

"The plaintiff complains of the defendant, the Omaha Brewing Association, and for cause of action alleges:

"1. That on the 2d day of February, 1893, the plaintiff sold and delivered to the defendant, the Omaha Brewing Association, certain saloon furniture, bar fixtures and stock, for the sum of \$1,375 and as part payment therefor the defendant procured to be executed and delivered to plaintiff the one certain promissory note of the defendant, Henry Semler, which note is in the words and figures following:

" '\$625. NORFOLK, NEB., FEBRUARY 2, 1893.

" 'On or before August 1st after date for value received I promise to pay to the order of H. Tillenburg six hundred and twenty-five dollars with interest at the rate of seven per cent. from date until paid.

" 'HENRY SEMLER.'

"2. No part of said sum mentioned in said note has been paid, although long since past due, and there is now due and unpaid thereon the sum of \$625 and interest at the rate of 7 per cent. per annum from February 2, 1893, and the defendant, the Omaha Brewing Association, though requested has not paid the same or any part thereof, and plaintiff has been unable to collect said note from said Semler who is insolvent.

"3. The defendant, the Omaha Brewing Association, at the time of purchasing said saloon furniture, bar fixtures and stock, agreed with the plaintiff in consideration

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of plaintiff taking the said Semler note, as part payment for said property so sold, to secure the said note to plaintiff, and thereupon agreed to, and did secure the same by giving the plaintiff a lien upon the said property so sold to insure the payment of said note, the instrument evidencing said lien is hereto attached and marked exhibit 'A.'

"4. The defendant, the Omaha Brewing Association, thereupon took possession of said property so sold, and upon which it had given the plaintiff a lien to secure the payment of said note. And, thereupon, and without the consent of plaintiff sold said property and converted the proceeds thereof to its own use and benefit, which property was of the value of \$1,000. And said defendant has neglected and refused to pay said sum of money evidenced by said note or any part thereof, although requested so to do.

"Wherefore plaintiff prays for judgment against the defendant, the Omaha Brewing Association, for the sum of \$625 with interest thereon from February 2, 1893, at the rate of 7 per cent. per annum and costs of suit."

Exhibit "A," referred to in the petition, is as follows:

"EXHIBIT 'A.'"

"Whereas, H. Tillenburg has this day sold his saloon to H. Semler, and whereas, said Tillenburg has accepted for said saloon one certain promissory note of \$625 signed by said H. Semler as part payment.

"Now if said Semler fails or refuses to pay said note or any part thereof, it is agreed hereby that said Tillenburg shall be secured by the contract between the Omaha Brewing Association and H. Semler, in the same way as the Omaha Brewing Association according to their respective claims.

"Norfolk, February 2, 1893.

"OMAHA BREWING ASSOCIATION,

"Per HENRY HEUBENS."

It is not easy to determine, from the petition just set out, whether the plaintiff sought to recover for a con-



version of the property on which he alleges he had a lien, or, for the balance due on the original consideration for which the property was sold. As to the former, the petition is clearly insufficient. The only allegation tending to show that the plaintiff had a lien on the property, is, that the defendant secured the note by giving a lien on the property, and that such lien is "evidenced" by Exhibit "A." There is no allegation of the existence of any contract between Semler and the defendant. The plaintiff insists that the defendant, having made the contract evidenced by Exhibit "A" is estopped to deny the existence of the contract between itself and Semler therein mentioned. The answer to this is that it is not alleged that Exhibit "A" was executed by the defendant. The mere fact that it is attached to the petition, and purports to have been signed by the defendant, tenders no issue, and falls far short of charging the defendant with its execution. The only allegation, then, that the plaintiff had any lien or interest in the property is that the defendant gave him a lien thereon. Such allegation, standing, as it does, without any statement of the facts showing a contract between the parties whereby such lien was created, is a mere conclusion and of no issuable value. *Cooper v. French*, 52 Ia., 531; *Esch v. White*, 85 N. W. Rep. [Minn.], 238; *Bloomington Mining Co. v. Searles*, 49 Atl. Rep. [N. J.], 543; *Bush v. Coler*, 69 N. Y. Supp., 770.

That the petition does not state a cause of action on the original consideration, to our minds, is equally clear. We recognize the rule that the note of a third party, given in settlement of a debt, does not operate as a payment of such debt, in the absence of an agreement to that effect. *Berry v. Griffin*, 69 Am. Dec. [Md.], 123. But, in our opinion, the facts pleaded do not bring the case within that rule. Its application is limited, we think, to cases wherein the note is a separate and independent transaction. In this case it was contemporaneous with and a part of the contract of sale. The petition, taken as

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a whole, does not show an agreement on the part of the defendant to pay \$1,375 for the property; on the contrary, it shows an express agreement that \$625 of that amount, the face of the note, was to be paid by Semler. He was not a third party, in the sense of being a stranger to the contract of sale, but was a party to it, as shown by his agreement to pay a part of the consideration. To hold the defendant liable for that part of the consideration which the parties had agreed should be paid by Semler, would be to make a new contract, and to impose a burden on the plaintiff which was not within the contemplation of the parties when the contract was made.

In our opinion the petition wholly fails to state a cause of action. In this view of the case, it is unnecessary to consider the other assignment relied upon, relating to the sufficiency of the evidence.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

JUDGMENT BELOW REVERSED.

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WILLIAM D. LASHMETT, APPELLEE, v. JOHN PRALL, APPELLANT, ET AL.

FILED JANUARY 8, 1902. No. 10,753.

Commissioner's opinion. Department No. 3.

1. **Bills and Notes: BONA FIDE PURCHASER: DEFINITION.** The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant.
2. **Fraudulent Conveyances: INDEBTEDNESS OF PLAINTIFF TO DEFENDANT A DEFENSE.** To an action by a judgment creditor to set aside conveyances alleged to have been made in fraud of the judgment, it is a defense that the plaintiff is indebted, upon simple contract, to the judgment debtor in an amount equal to the judgment.

## Lashmett v. Prall.

APPEAL from the district court for Loup county. Tried below before KENDALL, J. *Reversed and dismissed.*

O. A. Abbott, for appellant.

In an action in the nature of a creditor's bill it is a proper defense to show that the plaintiff is justly indebted to the defendant in a sum largely in excess of the judgment which is the basis of such an action. *Doyle v. Leitelt*, 97 Mich., 298; *Raymond v. Green*, 12 Neb., 215; *Burge v. Gandy*, 41 Neb., 149; *Nesbitt v. Campbell*, 5 Neb., 429; *Walker v. Sedgwick*, 8 Cal., 398.

A. M. Robbins and C. I. Bragg, contra.

In equity, in order to entitle a claim not in judgment to be set off against a judgment, it must be plead and proved that the person against whom the claim is sought to be set off, and who is the owner of the judgment, is insolvent. *Hobbs v. Duff*, 23 Cal., 627; *Howard v. Shores*, 20 Cal., 277; *Russell v. Conway*, 11 Cal., 93; *Naglee v. Palmer*, 7 Cal., 543; *Thrall v. Omaha Hotel Co.*, 5 Neb., 295; *Richardson v. Doty*, 44 Neb., 73; *Waterman*, Set-off [2d ed.], sections 347, 348; 22 Am. & Eng. Ency. Law [1st ed.], 449; *Bogg v. Jefferson*, 10 Wend. [N. Y.], 615; *Smith v. Briggs*, 9 Barb. [N. Y.], 252; *Firmenich v. Bovee*, 1 Hun [N. Y.], 532; *Goddard v. Stiles*, 90 N. Y., 199; *Thorp v. Wegfarth*, 56 Pa. St., 82; 7 Wait, Actions and Defenses, 526; *Gay v. Gay*, 10 Paige Ch. [N. Y.], 369; *Swift v. Prouty*, 64 N. Y., 545.

AMES, C.

On the 8th day of October, 1896, the appellee, William Lashmett, recovered a judgment for fifteen hundred dollars and costs, against the appellant, John Prall, in an action for damages for tort. Before the judgment, but after the cause for action arose, Prall had conveyed certain lands belonging to him to certain of his relatives without consideration. Execution having been issued and

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returned unsatisfied this action was begun to set aside the conveyances, and subject the land to the judgment. As a defense to this action Prall pleaded an indebtedness due to himself from Lashmett of \$2,505, and interest, upon a negotiable promissory note, executed by the latter to Sears Brothers, a partnership, and indorsed and delivered for value before due to the defendant. In reply it was denied that Prall was the owner of the note, and pleaded that at the time it was executed it was agreed that it should be treated merely as a memorandum of a transaction, by which Lashmett purchased a herd of cattle from Sears, the animals to be taken to Omaha and sold and settled for at the sum actually obtained for them at the sale. It was alleged that pursuant to this agreement, the cattle were sold for \$2,100 and a settlement made between the parties, in consequence of which Lashmett, after deducting \$1,350 previously due to him from Sears Brothers, paid the residue of the \$2,100 to the latter, thus satisfying the note in controversy. It is further alleged that Prall had notice of these facts before he acquired possession of the note, and it is denied that he paid value for it. The court made no general finding of fact. After finding that the conveyances by Prall were without consideration and void as to his creditors, concerning which finding there is no complaint, he found that an agreement as to the use to be made of the note was entered into between Sears Brothers and Lashmett substantially as pleaded, and that settlement and satisfaction of the indebtedness took place between the parties before the note came into the possession of Prall. The court did not find when Prall acquired the note or whether any, or, if any, what, consideration he paid for it, but it was found that Prall was not an innocent purchaser of the instrument because of having received notice concerning it through his agent, one John Wall. From the evidence preserved in the bill of exceptions it appears sufficiently that Prall obtained the note before its maturity, and as a collateral security for an indebtedness exceeding its amount, from Sears Brothers

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to himself. It is not disputed that Wall was at one time the agent of Prall, and that notice to him concerning the matter was effectual as notice to his principal. A few days after the cattle were sold, Prall sent Wall to Lashmett, to attempt to get the latter to pay the proceeds of the sale in satisfaction of the indebtedness to the former. As to what occurred at the interview Lashmett and Wall are the only witnesses, and their testimony is very brief. Wall testified that Lashmett said that he had given the note, but that Sears Brothers were owing him \$500, which he was entitled to have and should require to have credited thereon, before he would pay it. Lashmett says that the note was not mentioned in the conversation, and that he told Wall that he, Lashmett, was owing Sears Brothers \$700, or such a matter, and refused to pay him anything, and after he had gone away the witness settled with Sears Brothers. One of the Sears Brothers was present, and, Lashmett says, told him not to pay Wall anything, but it does not appear that he had any conversation with Wall.

The court evidently disposed of the case upon the assumption that a subsisting indebtedness of the plaintiff to the defendant is not to any extent or degree a defense to the action and did not therefore determine especially or otherwise which of these two versions of the interview is the more accurate. We are, consequently, called upon to determine that question for ourselves, and in the light of all the circumstances of the case are led to adopt the former of them. They agree in the respect that both represent Lashmett as admitting, or at least not denying, the validity of the note in its inception and its continuing obligation for some amount. In view of such admission we think the burden was upon the plaintiff not only to show the extent of the credit thereon to which he was entitled, but that having had an opportunity to make his claims in that respect known to the defendant through his agent, Wall, he made a full and fair disclosure of them and withheld nothing which it was to the interest of the latter to know. Fair dealing required at least this much at his

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hands. That he did not so conduct himself he now admits by asserting under oath that even his admission of an indebtedness of \$700 was false. This fact in connection with other circumstances, not necessary to be recited in detail, induce us to prefer the testimony of the apparently disinterested witness, Wall. This evidence is sufficient to charge Prall with notice that Lashmett was entitled to a credit on the note to the extent of \$500, but was not enough to put him on inquiry as to any other of the matters pleaded in the reply in this action. The indorsement upon the note is dated as of March 12, and the preponderance of the evidence is that it was not in fact made, nor the note transferred, until after the settlement between Lashmett and the payees on March 19. Thus is reached one of the vital points in the case. If Prall at the time the note was transferred to him, had parted with a present consideration on the faith of it, he would have been protected by the familiar rules of the law merchant. But it is conceded that he accepted it as collateral security for an antecedent indebtedness. We are not aware that this precise point has ever been before this court. The cases of *Helmer v. Commercial Bank*, 28 Neb., 474; *Koehler v. Dodge*, 31 Neb., 328, and *Cropsey v. Averill*, 8 Neb., 151, were all instances in which the note was accepted as collateral security for an indebtedness then created, and are supported by the great weight of authority and reason. But in *Martin v. Johnston*, 34 Neb., 797, it was held that one who accepted a negotiable note, without notice of defenses, in payment of an antecedent debt, was a *bona fide* holder for value, and precisely the same principles must apply to one who receives such an instrument as collateral security. Such is also, we think, the weight of authority in this country and in England. Colebrook, *Collateral Securities*, section 18, *et seq.*, and notes. Prall is, therefore, entitled to be regarded as an innocent holder for value of the Sears Brothers' note to the extent of \$2,005, and interest, but it is urged that a simple contract debt of Lashmett to Prall is not a defense to the action, because

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of the general rule that such a debt cannot be set off in equity against a judgment. This rule is, however, not applicable to the case. The appellee is not seeking to set off his note against the judgment. Should his defense be upheld, the judgment and whatever legal processes are provided for its enforcement would remain unimpaired. The plaintiff below invoked the aid of a court of equity, to assist him in the collection of his demand, because, he says, he is without remedy at law for the enforcement of a just claim, but if in truth he is indebted to the defendant in a sum equal to, or greater than, the amount of the judgment, the legal obstacles which he asks to have removed are afflicting him with no injustice, and it is immaterial by what instrument, or whether by any, his obligation to the defendant is evidenced. The case would be quite different if the defendant were seeking the aid of a court of equity to restrain the collection of the judgment by execution, or if, by like means, he was seeking to procure a discharge or satisfaction of the judgment. He is doing neither, but on the other hand the plaintiff is prosecuting a suit in equity and should be content to submit to any equitable defense. The persons to whom Prall conveyed his lands, are the natural objects of his bounty. If Lashmett is justly indebted to him it would be inequitable to sacrifice the property by judicial sale, for the sole reason that the note in question has not been reduced to judgment, and it does not appear to us that the question of Lashmett's solvency is material. The note could, of course, not have been pleaded as a set-off in the action for tort.

We think the record discloses a complete defense and it is recommended that the judgment of the district court be reversed and the action dismissed.

DUFFIE and ALBERT, CC., concur.

REVERSED AND ACTION DISMISSED.



Clark v. Wolf.

SARAH J. C. CLARK, APPELLEE, V. ADAM WOLF, APPELLANT,  
ET AL.

FILED JANUARY 8, 1902. No. 10,764.

Commissioner's opinion. Department No. 1.

1. **Judicial Sales: CERTIFICATES OF LIENS: PRESUMPTION AS TO TIME OF FILING.** Where the record is silent as to the time of filing copies of the certificates of liens, it will be presumed that they were duly and regularly filed.
2. **Appeal and Error: JUDICIAL SALES: IRREGULARITIES.** A sale will not be set aside for irregularities or errors not prejudicial to the party complaining.

APPEAL from the district court for Howard county.  
Tried below before KENDALL, J. *Affirmed.*

*Bell & Robinson*, for appellant.

*Henry Nunn*, contra.

DAY, C.

This is an appeal from the confirmation of a judicial sale made in pursuance of a decree of mortgage foreclosure entered by the district court for Howard county. The appellant urges as an objection to the confirmation of the sale that no copy of the certificates of the county treasurer, county clerk and clerk of the district court, of liens upon the premises, were filed in said cause before the sale. The record contains copies of the application of the sheriff to the several officers above named for liens, together with their certificates, but is silent as to when the copies were deposited with the clerk of the district court. Where the record is silent as to the filing of copies of the certificates of liens it will be presumed that they were duly and regularly filed. *Bostwick v. Keller*, 62 Neb., 815.

It appears from the briefs of counsel that the sheriff filed with the clerk of the district court, before the advertisement, the original certificates obtained from the county officers, above named, instead of copies. There is nothing



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in the record from which this fact appears and we can not consider it. Moreover, the property sold for two-thirds of the gross valuation placed upon it by the appraisers and, therefore, no possible prejudice resulted to the appellant. A sale will not be set aside for irregularities or errors not prejudicial to the party complaining. *Miller v. Lanham*, 35 Neb., 886.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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THE CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY,  
TRUSTEE, APPELLEE, v. GEO. W. SOUTHWICK ET AL.,  
IMPLEADED WITH GEORGE A. KLECKNER ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,779.

Commissioner's opinion. Department No. 3.

**Appeal and Error: CONFLICTING EVIDENCE.**

APPEAL from the district court for Cedar county.  
Tried below before EVANS, J. *Affirmed.*

*Alfred C. Strong*, for appellants.

*J. O. Robinson*, contra.

AMES, C.

This is an appeal from a decree of foreclosure and sale of a mortgage upon lands. The defense is payment. The trial court was met at the threshold of the controversy by the inquiry, whether the person to whom the payment was made was the agent of the mortgagee with sufficient authority to receive it. This question was, by a general finding of all the issues of fact in favor of the plaintiff answered in the negative. We have examined the record so far as to ascertain that the evidence upon this point, which

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is both direct and circumstantial, is in sharp conflict. It is the settled rule of this court that in such a case the finding of the trial court will not be disturbed.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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CHARLES CROCKETT V. BELLE MILLER.

FILED JANUARY 8, 1902. No. 10,782.

Commissioner's opinion. Department No. 1.

1. **Evidence: FRAUD APPEARING FIRST IN DEFENDANT'S EVIDENCE.** Where plaintiff's evidence fails to show a *prima facie* case, but defendant goes on without objection and supplies facts which in connection with that evidence, if taken as true, would make out a case for plaintiff, it is not error to permit plaintiff to rebut a showing as to fraud which appears for the first time in defendant's evidence.
2. **Contract: ORAL EVIDENCE: RULE AS BETWEEN PARTY AND STRANGER.** Doctrine as to inadmissibility of oral evidence to vary a contract has no application as between a party to it and a stranger where there appears no estoppel against showing the truth.
3. **Fraud: INSTRUCTIONS: GOOD FAITH PRESUMED.** Instruction that good faith is presumed in business transactions, and fraud, if alleged, must be shown, *held*, correct, as applied to matters in which the parties do not appear to have any family relationship.
4. **Appeal and Error: INSTRUCTIONS: UNDERSCORING WORDS.** Underscoring in an instruction the words *bona fide*, not prejudicial to a party alleging fraud.

ERROR from the district court for Knox county. Tried below before ROBINSON, J. *Affirmed.*

L. C. Chapman, John R. Hays and E. A. Houston, for plaintiff in error.

W. L. Henderson, S. Draper and M. F. Harrington, contra.

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HASTINGS, C.

The first error now complained of by the defendant below, plaintiff in error here, is irregularity on the part of the trial court in permitting the plaintiff to make out her ownership of the property replevied by evidence introduced on rebuttal. It is also claimed that the verdict is contrary to law, and not sustained by sufficient evidence in that the plaintiff's evidence shows at most only a joint title in plaintiff and her husband, while she replevied the entire interest. It is also claimed that there was error in instructing that fraud is never presumed, but must be proved, and that the law presumes that every person transacts business in good faith, and that the burden is upon the party charging fraud to establish it. There is further complaint as to the underscoring of the words "*bona fide*" in an instruction.

It must be admitted that if the case had stopped when plaintiff rested, her title to the goods replevied would have remained very dubious indeed. Plaintiff's evidence in chief consisted of the testimony of the defendant, sheriff, that he levied upon the stock of boots and shoes in question under an execution against one Joseph Horkey; that the goods were taken from him by replevin, and that he at no time ever bought them from Belle Miller, plaintiff. George E. Cheney then testified that he owned the lot and building in Creighton in which this stock of goods was kept; that he leased it in March or April to Belle Miller or to Miller & Company, which he said was the same thing, and that she paid the rent. On cross-examination he said that he made and delivered the lease to I. B. Miller, her husband; that he received the rents from the hands of Joseph Horkey, defendant in the execution on which the goods were taken; that the stock of goods was chiefly that which Mr. Horkey had formerly owned, but there had been no removal of it from the building since Horkey owned it; that it had been sold on mortgages about February 5 to a Mr. Bonesteel, who sold it to the Millers

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about March 20; that after its second sale Mr. Horkey and Mr. Miller were there about a week, when the latter left and Horkey had been in charge ever since until the levy in June, apparently managing the stock. Mrs. Miller he said was not there at the time of the purchase so far as he knew, and an objection was sustained to the question as to whether she had been there since. On cross-examination he testified that the rent was paid by checks signed Miller & Company, drawn by Mr. Horkey. I. B. Miller testified to the authenticity of Mrs. Belle Miller's signature on exhibit "B," which was a certificate of association, certifying that she constituted the firm of Miller & Company, whose business was general merchandizing at Creighton, Knox county, Nebraska. This certificate and that of its recording on May 19, 1897, and before the levy was made, was introduced and plaintiff then rested.

It must be admitted that this evidence falls decidedly short of establishing, *prima facie*, the ownership of Mrs. Miller, and if the defendant had then rested his case, any judgment against him would have to be reversed. The evidence simply discloses that the goods when seized on the writ against Mr. Horkey were under that gentleman's apparent control in a building leased to Miller & Company in which Mr. Horkey was carrying on a merchandizing business under that name. There is not, in plaintiff's testimony, any indication of authority on the part of Horkey to act for Mrs. Miller, and until such authority was proved, his possession could not be treated and should not have been recognized as that of plaintiff. It is urged on her behalf that the only thing needed to be shown, to establish a *prima facie* case for her, was possession of the goods at the time of their seizure. This may be granted, but the evidence falls short of establishing any such position. To do that required something more than simply a showing that the goods were in a building leased to plaintiff and were in charge of a former owner not shown to have any authority from her. Defendant, however, did not permit the matter to rest there, but introduced a considerable

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amount of evidence to show that on January 7, preceding this levy, a large stock of goods owned by Joseph Horkey previous to that time had been seized under a couple of chattel mortgages in favor of the Bank of Creighton and H. E. Bonesteel, another mortgage or two placed upon them, and had been sold at foreclosure sale to Bonesteel and, by Bonesteel, a portion of the goods embracing those levied upon, sold to I. B. Miller, who was claiming to act on behalf of his wife, and who placed Horkey and a brother of the wife in charge. An effort was made to show that these mortgages were fraudulent and the possession and sale under them a fraud to cover Horkey's property against attacks by his creditors, and the sale to Miller a sham. Evidence was admitted in rebuttal of defendant's proof, and hence the complaint.

The complaint seems not well founded. While there seems to have been nothing in the evidence in chief which required the defendant to go on, nevertheless, when he did go on, and produced his evidence, which supplemented that of plaintiff in the particular in which it was lacking, it became competent for plaintiff to rebut that portion of defendant's evidence which tended to indicate fraud in the transactions shown by him. The court does not seem to have gone outside of the evidence given by defendant in admitting the rebuttal, and the main error relied upon for the reversal of this case can not be found in it.

The verdict must also be held to be sustained by sufficient evidence. So far as this point is concerned the complaint is that the bill of sale made by Bonesteel was to plaintiff and her husband, and it is objected that that instrument was conclusive and evidence inadmissible to show that the actual title was conveyed to plaintiff alone, and also that the evidence taken as a whole does not show such title. It is true that there is a doctrine that when the parties to an agreement have reduced it to writing that writing shall be deemed conclusive in any dispute between them as to what the agreement was. But it does not seem that the defendant here can claim any such conclusive-

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ness in regard to this instrument made between other parties. The sole question is one of intention between them, and so far as defendant is concerned it is a matter of no importance to him as between plaintiff and her husband on what terms or for what consideration or by what means the sole title to these goods was transferred from her husband to plaintiff, if at the commencement of the action she had it. No denial is tendered of testimony going to show that when this bill of sale was made the arrangements between plaintiff and her husband were not completed, but that before the transaction was completed and the consideration paid, it was agreed that the wife should hold the title.

It seems hardly necessary to discuss the instructions complained of. The first one, No. 2, is as follows: "Fraud is never presumed but must be proved. The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who charges fraud. In this case the burden of proving fraud is on the defendant." This instruction seems a fair statement of the law in this case in which we are not dealing with transfers between members of the same family. The complaint that the presumption of good faith is there stated as being conclusive is certainly not tenable.

The objection that in setting out the nature of defendant's claim by instruction No. 3, the words "*bona fide*" are underscored is certainly no better. That the jury's attention was thereby particularly challenged to the proposition that plaintiff was claiming good faith can hardly have prejudiced the defendant, when they were also told distinctly the nature of defendant's claim to the contrary. The emphasizing the idea of good faith can hardly assist in the perpetration of fraud.

It is therefore recommended that the judgment of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

Murphy v. Sampson.

E. W. MURPHY V. PHELIX SAMPSON.

FILED JANUARY 8, 1902. No. 10,798.

Commissioner's opinion. Department No. 1.

**Master and Servant: BREACH OF CONTRACT: QUANTUM MERUIT.** Where a party hires himself to another for a fixed period, and leaves the service before the expiration of his term, though without fault on the part of the employer, he may recover the value of the services as upon *quantum meruit*, less such damages as the employer may have sustained by the breach of the contract.

ERROR from the district court for Lincoln county. Tried below before GRIMES, J. *Affirmed.*

*T. C. Patterson*, for plaintiff in error.

*Hoagland & Hoagland*, contra.

DAY, C.

This action was originally commenced in the county court for Lincoln county by Phelix Sampson against E. W. Murphy to recover the value of certain services performed by the plaintiff for the defendant as a farm laborer. In the county court there was judgment for the plaintiff. The defendant appealed to the district court, where, upon trial, the plaintiff again recovered judgment for \$28.30 and costs. To review this judgment the defendant has brought error to this court.

There is a serious dispute between the parties as to what their contract was. Plaintiff claims that he agreed to work for the defendant as a farm laborer for a period of three months, commencing May 8, 1897, for which he was to receive his board, \$5 in money or clothing and a horse worth \$60; that after he had worked sixty days he discovered that the horse which the defendant proposed to give him was a very inferior animal and was not worth to exceed \$25. The plaintiff also claimed that he was mistreated by the defendant, whom the testimony shows was a profane and violent man and much given to cursing his

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men, especially if anything went wrong. For these reasons plaintiff abandoned the contract, and, being unable to get any settlement out of the defendant for the work he had performed, brought this action. The defendant on the other hand claims that the plaintiff agreed to perform three months' service as a farm hand, commencing June 8, 1897, for which he was to receive his board, \$5 in money or clothing and a certain horse called "Cap." and that nothing was said or agreed upon as to the value of the horse. There is also a dispute as to the length of time the plaintiff worked. The plaintiff says he worked from May 8 to July 8, while the defendant claims the plaintiff worked from June 8 to July 22.

It is contended by the defendant that the contract being an entirety, that plaintiff should work three months for the horse, and defendant being ready and willing to perform the contract on his part, that plaintiff by abandoning the contract without just cause has forfeited his right to recover anything for his work. There are many authorities which sustain this position. Indeed nearly all of the older authorities do, but we think a majority of the later cases sustain the doctrine that where a servant has in part fulfilled his contract for personal services, he may recover *quantum meruit* from his master, deducting therefrom such damages as the master may have sustained by reason of the breach of the contract. This rule is recognized in *Parcell v. McComber*, 11 Neb., 209. In that case McComber had agreed to work for Parcell for one year from October 1, 1876, for the sum of \$195. After working five months he quit and brought suit to recover the value of his services. It was held that he could recover the actual value of his labor, not exceeding the rate agreed upon less any damages which had been sustained by Parcell by reason of the failure of McComber to work the entire year. *Burkholder v. Burkholder*, 25 Neb., 270.

The leading case which sustains the foregoing proposition is *Britton v. Turner*, 6 N. H., 481. There the plaintiff had contracted to work for the defendant for a year for



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the sum of \$100 but he left the defendant's employment after working for him for about nine months without the consent of the defendant and without good cause. It was held that he could recover on *quantum meruit*, less such damages as the defendant might have sustained by the breach. *Duncan v. Baker*, 21 Kan., 99; *Byerlee v. Mendel*, 39 Ia., 382; *Wolf v. Gerr*, 43 Ia., 339. In *McClay v. Hedge*, 18 Ia., 66, Judge Dillon, who wrote the opinion of the court, used the following language:

"The controversy is, whether in such a case he may recover as upon a *quantum meruit*. This question was settled in this state by the case of *Pixler v. Nichols*, 8 Ia., 106, which distinctly recognized and expressly followed the case of *Britton v. Turner*, 6 N. H., 481. That celebrated case has been criticised, doubted and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases."

The court instructed the jury in harmony with the rules above announced, both with respect to the theory of the defendant, which was that the horse "Cap." was to be given for the service of plaintiff, and also with respect to the theory of the plaintiff that the horse he was to receive was to be worth \$60.

We have examined the instructions and the evidence and can find no prejudicial error in the record and therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Sullivan Savings Institution v. Sharp.

SULLIVAN SAVINGS INSTITUTION, APPELLANT, v. ARNOLD D.  
SHARP ET AL., APPELLEES.

FILED JANUARY 8, 1902. No. 10,807.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: CONFLICTING EVIDENCE ON APPEAL.** When the evidence is fairly conflicting, or where the case, as made by the evidence, is such that reasonable minds might fairly differ as to the correct and proper conclusion to be drawn therefrom, a finding of fact made by the trial court will not be disturbed on appeal. *Booth v. Kessler*, 62 Neb., 704, 87 N. W. Rep., 532, followed.
2. **Mortgages: RIGHT TO RELEASE DISPUTED: LIABILITY OF MORTGAGEE.** A mortgagee is not liable for a failure or refusal to release a mortgage, when the right of the person demanding such release is a disputed question.

APPEAL from the district court for Chase county. Tried below before NORRIS, J. *Affirmed in part, reversed in part.*

*Flansburg & Williams*, for appellant.

*N. K. Griggs*, contra.

OLDHAM, C.

This was a suit for the foreclosure of a real estate mortgage. The petition was in the ordinary form. The answer of the defendant, The Chase County Land & Live Stock Company, admitted the execution and delivery of the mortgage by its grantors, defendants, Sharp and wife, and pleaded payment. The answer also asked for damages on a counter-claim against the plaintiff because of its alleged failure to release the mortgage after the payment and demand made by the answering defendant for such release. There was a finding for the defendants by the court below and a judgment entered cancelling the mortgage of plaintiff and also a judgment rendered in favor of defendant on its counter-claim for \$100 damage for the alleged failure and refusal of the plaintiff to release the mortgage

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on demand of defendants after payment had been made. From this judgment plaintiff has appealed to this court.

The only question called to our attention in the brief of appellant is the contention that the judgment is not sustained by sufficient evidence. The trial proceeded below largely on a stipulation of facts and a stipulation as to what the evidence would be of the material witnesses for both plaintiff and defendants. By agreement this stipulation was offered in evidence and admitted by the trial court as the testimony of these witnesses. It appeared without dispute in the testimony that the loan in controversy was made by C. C. Burr of Lincoln to the defendants, Sharp and wife, and that Burr at that time was acting as the agent of the plaintiff in making loans in Nebraska. It also appears without controversy that all the coupons on the note were paid either by Sharp or the defendant, The Chase County Land & Live Stock Company, to C. C. Burr, and that such coupons so paid were returned to the defendants. It also appears that at or about the time of the maturity of the note the defendant, The Chase County Land & Live Stock Company, paid the note in full and the last coupon due thereon to C. C. Burr, and that the coupon was returned to this defendant but the note and mortgage were not. It also appears from the stipulation of the parties without any dispute that Burr was permitted not only to collect coupons for interest due on plaintiff's loans but he was permitted to collect the principal of said loans and to reinvest and reloan the money so collected for the plaintiff. The testimony conflicts with reference to Burr's authority to collect money on notes and coupons that had not been delivered to him by the plaintiff. According to the testimony admitted as that of the witness, Burr, he had this authority; but according to the testimony admitted as that of the witness, Farwell, the president and western manager of the plaintiff, Burr was only permitted to collect and reinvest such money of the plaintiff as was collected from notes and coupons sent to him by plaintiff. It was admitted in the stipula-

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tion that after the collection by Burr of the note sued on in this controversy he had a settlement with Farwell for the money he had collected for the Sullivan Savings Institution and had not remitted and that he executed mortgages on over 30,000 acres of real estate and also on city property in the city of Lincoln to secure the payment of over \$40,000 of the moneys that he had collected and failed to remit. It is stipulated that Burr will swear that this settlement was made from a schedule which he prepared and submitted to Farwell of all the loans which he had collected for the plaintiff and had not remitted at the time of this settlement and that this schedule contained the note sued on in this controversy. This schedule is attached to and made a part of the stipulation as to Burr's testimony. It is stipulated on the contrary that Farwell would testify that the settlement that he made with Burr was only for loans which had been forwarded by plaintiff to Burr for collection and did not include the loan in controversy. The other testimony admitted was largely corroborative either of the theory of Burr or of Farwell as to the scope of Burr's agency and was about evenly balanced in this respect.

We think, that in this state of the record we can apply to this case with much propriety the language used by HOLCOMB, J., in the case of *Booth v. Kessler*, 62 Neb., 704, 87 N. W. Rep., 533, when he says: "We incline to the view that, as established by the evidence, it is a case where reasonable minds might very properly differ as to the proper conclusions to be drawn therefrom, and, if so, we are not warranted in disturbing the finding, even though we might be of the opinion that a different conclusion than that reached by the trial court might be more proper. The rule is that in appeal and a trial *de novo* the findings of the district court will not be disturbed unless they cannot be reconciled with any reasonable construction of the testimony. *Gadsden v. Phelps*, 37 Neb., 590, 56 N. W. Rep., 314."

We therefore conclude that so far as the court found

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generally for the defendants and directed a cancellation of the mortgage its judgment should be affirmed, but on the question as to the sufficiency of the evidence to sustain the judgment of the trial court on defendant's counter-claim for damages we are unable to find any testimony in the record which we think sufficient to sustain this judgment. We think the clear weight of authorities sustains the proposition that a mortgagee is not liable for a failure or refusal to release a mortgage, when the right of the person demanding such release is a doubtful question. *Lane v. Frake*, 70 Ill. App., 303; *Henson v. Stever*, 69 Mo. App., 136; *Parkes v. Parker*, 57 Mich., 57.

We therefore recommend that the judgment of the district court rendered on defendants' counter-claim for damages be reversed and that defendants' counter-claim for damages be dismissed; and that the judgment of the district court finding generally for the defendants and dismissing plaintiff's petition and directing the cancellation of plaintiff's mortgage on the land in controversy be affirmed.

SEDGWICK and POUND, CC., concur.

The judgment of the district court rendered on defendants' counter-claim for damages is reversed and the defendants' counter-claim for damages is dismissed, and the judgment of the district court finding generally for the defendants and dismissing plaintiff's petition and directing the cancellation of plaintiff's mortgage on the land in controversy is affirmed.

AFFIRMED IN PART, REVERSED IN PART.

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**WILM J. FOKENGA, APPELLANT, V. THOMAS CHURCHILL,  
APPELLEE.**

FILED JANUARY 8, 1902. No. 10,811.

Commissioner's opinion. Department No. 3.

1. **Highways: AUTHORITY OF COUNTY BOARD TO CONSTRUCT CULVERT.**  
On the facts stated, *held*, that the county board had authority to direct the road overseer to place a culvert across a highway in his district.
2. **Highways: ORDER TO BUILD CULVERT: DESIGNATION OF PLACE.** It is not necessary in such order to designate the specific point on the highway at which such culvert is to be placed.
3. **Highways: ENJOINING CONSTRUCTION OF CULVERT: SURFACE WATERS.**  
In an action to enjoin the construction of such culvert, the question is not whether it would divert the surface drainage from its natural course to the plaintiff's injury, and, if so, whether it was the best and most advantageous means of disposing of such water, but whether such culvert was reasonably necessary to a proper maintenance of the road.

APPEAL from the district court for Johnson county.  
Tried below before LETTON, J. *Affirmed.*

*M. B. C. True*, for appellant.

*L. C. Chapman*, contra.

ALBERT, C.

The appellant brought this action against the appellee, the overseer of highways of a certain road district, to enjoin the placing of a culvert across a highway adjoining the plaintiff's land. The petition alleges in substance, that the defendant is the acting overseer of road district No. 14 of Johnson county and that the plaintiff is a freeholder of said county and is the owner of the north half of the northwest quarter of section 4, township 5, range 9 west; that a duly laid out highway extends along the section line running between said section and section 4, within said road district; that the northern and larger portion of the north half of said section 5 slopes to the

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east, towards the said land of the plaintiff; that during and after heavy rainfalls, a large amount of water rushes down the eastern slope of the northeast quarter of section 5, towards the lands of the plaintiff; that the said road district has heretofore dug a ditch along the western side of said road, which is sufficient, if kept clear of obstructions, to take all the water that may fall upon said northeast quarter of section 5, and adjoining land, toward Hooker creek on the south, except a small amount that may fall to the north, towards the south fork of the Great Nemaha river; that said ditch terminates near the southwest corner of plaintiff's land, and can be extended further south so that it will discharge its entire flow of water into Hooker creek without any damage to any lands along said road; that the defendant has threatened to put a culvert across said road, between the southern half of plaintiff's land and section 5, through which, if made, the waters from the northern half of said section 5 will flow upon the lands of this plaintiff on section 4, and greatly damage said lands; that the place where the defendant threatens to put said culvert is not the natural water way nor the place where the water would naturally flow; that said culvert is unnecessary; that there is a natural water way across said road, near the southwestern corner of plaintiff's land, where such culvert may be placed advantageously; and that the defendant's threats, if carried into effect, would result in great and irreparable damage, for which the plaintiff has no adequate remedy at law.

The defendant answered, admitting that he was threatening to place the culvert across the road as charged in the petition, but averred that he was acting by virtue of an order of the county commissioners, as follows: "Emil Kopelin, overseer of highways in road district No. 14, is hereby directed to put in two culverts on the section line between the northeast quarter of section 5, range 9, Johnson county, Nebraska, the same being the section line and road involved in the action of *Churchill v. Beethe* (48

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Neb., 87). The clerk is directed to give said overseer orders to carry this order into effect." The answer also contains a general denial of all allegations in the petition not admitted. The court found for the defendant, and entered a decree accordingly.

The appellant contends that the order of the county commissioners is insufficient, to justify the defendant in constructing the proposed culvert, for the reason it does not designate the location with sufficient certainty, and for the further reason, that the overseer alone should determine the location of culverts. Section 1, chapter 78, Compiled Statutes, 1901, reads: "The county board has a general supervision over the public roads of the county, with power to establish and maintain them as herein provided, and to see that the laws in relation to them are carried into effect."

Section 76, of the same chapter, so far as is material at present, is as follows: "In counties not under township organization the road tax shall be paid in cash. One-half of all moneys paid into the county treasury from the several road districts in discharge of road tax shall constitute a county road fund which shall be divided equally between the commissioner districts and shall be at the disposal of the county commissioner in his district for the general benefit of the county roads therein; provided that the other one-half of all moneys so paid into the county treasury from the several road districts, in discharge of road tax, and all cash labor tax shall constitute a district road fund, and shall be expended by the county commissioners in the road district from which it was collected, for the following purposes: *First*—for the construction and repair of bridges and culverts, and making the fire guards along the line of roads. *Second*—for the payment of damages of the right of any public road. *Third*—for the payment of wages of overseers, and for the expense of procuring the necessary tools. *Fourth*—for the payment of wages of commissioners, of roads, surveyor, chainman, and other persons engaged in locating or altering any



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county road, if the road be finally established or altered as hereinbefore provided. *Fifth*—for work and repairs on roads.”

From the sections just quoted, we think it clear, that the county board may direct the overseer to make improvements in the highways of his district, including the construction of culverts. As to the details, we are equally clear that much may and should be left to the discretion of the overseer. He is supposed to be on the ground and familiar with the roads in his district, and their condition and needs. The precise place at which a culvert shall be placed is purely a matter of detail, and the failure of the county board to designate it does not invalidate the order. Were it proposed to construct a culvert under contract in pursuance of the provisions of section 83 of the same chapter, a different question might arise.

The appellant's theory of this case, as gathered from the pleadings and the evidence, is, that the proposed culvert will divert the surface water, to his injury, and that such culvert is not the best means of disposing of such water, and is unnecessary. Considerable evidence was received in support of this theory. On the other hand, several witnesses produced by the defendant testified in effect, that, before the road was graded, such surface water was largely, if not wholly, carried off through a ditch or swale extending across the road at the proposed location of the culvert, and to other facts tending to show that the construction of the culvert at that place was reasonably necessary and proper for the maintenance of the highway. Hence, even should we adopt appellant's theory of the case, the rule, that the finding of the trial court on conflicting evidence will not be disturbed, stands as an insuperable barrier to the relief sought by this appeal. Besides, the question before the trial court was not whether the proposed culvert would divert the surface drainage from its natural course to appellant's injury, and, if so, whether it was the best and most advantageous means of disposing of such water, but

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whether such culvert was reasonably necessary to a proper maintenance of the road. *Churchill v. Beethe*, 48 Neb., 87. On that point, the finding of the trial court is abundantly sustained by the evidence. The law in regard to surface water is discussed at some length in the briefs. Our failure to go into that subject at greater length arises from no lack of interest, but from the belief that what has already been said disposes of the case.

We recommend that the decree of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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THE GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS,  
v. HENRY STINER.

FILED JANUARY 8, 1902. No. 10,813.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: PLEADINGS: MOTION TO STRIKE FROM REPLY.** It is not error to overrule a motion to strike, which includes, together with some matter which should have been stricken out of a reply, other matters which embody a proper reply.
2. **Appeal and Error: INSTRUCTIONS: EXCEPTIONS.** Instructions can not be reviewed in this court unless the record shows they were passed upon by the trial court and an exception taken to the rulings thereon.
3. **Insurance: EVIDENCE: WAIVER: INSTRUCTIONS.** Evidence *held* to warrant the submission to the jury of question as to whether or not the insurance company was aware of facts as to conditions of the policy at the time of the acts relied upon as a waiver, and instruction No. 5, set out in the opinion, *held*, to properly submit that question.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Affirmed.*

*Smith & Olmstead*, for plaintiff in error.

*L. B. Stiner and Tibbetts Bros. & Morey*, contra.

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HASTINGS, C.

July 18, 1893, the plaintiff below and defendant in error here took out a policy of insurance in the sum of \$2,000 in the defendant company, insuring plaintiff's farm dwelling house in the sum of \$1,000, farm barn and shed adjoining in the sum of another \$1,000, against loss by fire, from July 15, 1893, to July 15, 1898. September 17, 1897, the barn was destroyed by fire. The next morning the plaintiff notified H. O. Smith, of Lexington, through whom the insurance had originally been effected, and he at once notified the insurance company at Freeport, Ill., of the loss. On Sept. 28, the adjuster of the company went to Lexington, went to the real estate records of the county and procured a certified copy of a mortgage made in 1894, of \$700, upon the eighty acres of land on which the barn was situated. This mortgage seems to have been still in force at the time of the fire, but was paid just before the institution of this action. The policy contained the provision "if the property shall hereafter become mortgaged or incumbered \* \* \* without consent indorsed hereon then \* \* \* this policy shall be null and void." The adjuster after procuring a copy of the mortgage went to plaintiff's home, found him away, but later met him a couple of miles from his home, asked him to go to Lexington that night to settle the matter; Lexington being about nine miles away. Plaintiff repaired to Lexington that evening and found the adjuster at the lumber yard ascertaining the amount of the lumber that went into the barn. From there they went to the hardware store and found it closed. They then went to the adjuster's room at the hotel, where a proof of loss was made out and plaintiff was sent to look for a notary. Not finding one readily they took plaintiff's buggy and started toward the northern part of the town to a notary's residence where the proof of loss was sworn to. The proof of loss contained a statement to the effect that there had been no transfer or incumbrances or change of ownership or occupancy since

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the issuance of the policy. After the execution of this proof, the adjuster asked the plaintiff whether there was a mortgage, and was informed that there was one. Also inquired whether the plaintiff had permission to make a mortgage and was told that he had none. Some dispute appears in the testimony as to what further happened; plaintiff claiming that the adjuster thereupon told him he had sworn falsely in making the proof and had thereby forfeited his claim, but the plaintiff also admits that the adjuster claimed the policy was void, because of the existence of the mortgage. The adjuster denies charging the plaintiff with having sworn falsely. An arrangement seems to have been made on that occasion whereby the adjuster was to procure \$500 for the plaintiff, and the plaintiff indorsed his policy and surrendered it. Subsequently the adjuster seems to have written a receipt for \$500 over plaintiff's signature, and within three or four days of the interview at Lexington sent the plaintiff a draft for \$500. A part of the arrangement of settlement at Lexington had been that the policy should be reinstated with reference to the house. A few days after the draft, what is termed by the parties, a mortgage slip, consenting to the placing of incumbrances to the extent of \$700 was sent to plaintiff. In the meanwhile plaintiff had become dissatisfied with his settlement, had retained the draft without cashing it, and in fifteen or twenty days caused it to be returned to the defendant's adjuster with a demand for the return of the policy and for payment in full. Payment was not made, and an action was begun on the policy to recover its full amount. It is alleged in the petition that the policy had been surrendered on the representation of defendant's agent that it was needed for the purpose of indorsing the payment of loss thereon, and for the purpose of attaching the mortgage clause as to the remaining property. The insurance and destruction of the property is not questioned. Damage to plaintiff is denied, and the requesting of proofs on its part, and that they were furnished by plaintiff, and the lapse of sixty days since

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such proof, and all indebtedness are denied. The answer also sets up the incumbrance clause of the policy and its violation and that thereby the policy became void. Plaintiff replied that the answer stated no defense; that the mortgage was no increase of the risk as the land was worth over \$5,000; that the mortgage was placed on the premises with the full knowledge of defendant's local agent; that plaintiff had a large amount of other property, and a note secured by the mortgage was signed by his wife, who also had large property interests, and that the mortgage was made at plaintiff's instance, the mortgagee being satisfied with the unsecured note of plaintiff and wife. This matter was all stricken out of the reply on defendant's motion. So also were certain allegations as to defendant's obtaining the policy by false charges of perjury and procuring an agreement for a settlement by such means. There was left, however, in the reply the following allegations:

"Plaintiff further alleges that with full notice then and there, of all the foregoing facts, said Rowntree refused to pay said loss, on the sole ground that plaintiff had committed perjury, and afterwards with full knowledge of all the foregoing facts, defendant sent plaintiff a slip to be attached to said policy, consenting to said mortgage, and making any loss thereunder, as to other property covered by said policy, payable to the mortgagee, in said seven hundred dollar mortgage, but refused to return said policy to plaintiff, though the premium thereon has been paid, and said policy is in full force and effect, and belongs to plaintiff, but still withholding said policy, sent an order drawn by said Rowntree on defendant, for the sum of five hundred dollars (\$500), offering the same in full satisfaction of said loss, which offer was by plaintiff refused, and said order returned.

"Plaintiff further alleges that said Rowntree has since the return of said order made frequent offers to settle said loss for an amount largely below the amount named in said policy, basing his reasons therefor on the ground that

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the loss sustained was not in fact equal to the amount named in said policy, and claiming that defendant had a right to rebuild said barn and could not be forced to pay full amount named in said policy, and by reason of the premises aforesaid, and by its negotiations for the settlement of said loss, defendant has waived and has become estopped from interposing as a defense, said alleged forfeiture of said policy."

It is probable that a large part of each of these paragraphs should have been stricken out as pleading evidence, and some of it inadmissible evidence, instead of the ultimate facts. Failure to strike out matter is, however, not reversible error unless prejudice has been caused. *Lincoln Mortgage & Trust Co. v. Hutchins*, 55 Neb., 158; *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb., 1. Nor is it error to overrule a motion which is too broad in its scope. *Smith v. Meyers*, 54 Neb., 1; *Zimmerer v. Fremont Nat. Bank*, 59 Neb., 661. Plaintiff was entitled to put up the plea of waiver of the forfeiture on this insurance policy, but not to set up all the evidentiary facts going to show such waiver. The motion makes no distinction between the proper and necessary portions of these paragraphs and the improper, but strikes at them all, and it was not error to overrule it.

Complaint is made of the admission in evidence of the draft, but that was especially excluded from the consideration of the jury by the instructions of the court. Counsel also complain of the admission in evidence of conversations and transactions of compromise which took place after the plaintiff in error had declared the policy void. In our opinion the complaint is not well taken, because the question whether or not the defendant had declared the policy void is among the issues and is disputed in the evidence. The negotiations for a settlement are not admissible as independent evidence to establish a claim but specific portions of them which tend to indicate that the defendant after having full knowledge of the existence of the mortgage treated the policy as valid and in force would

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be admissible for the purpose of establishing that fact wholly independent of any question as to whether such admission and such treatment of the policy as valid occurred during negotiations for a settlement or under other circumstances. 1 Greenleaf, Evidence [16th ed.], section 192.

Complaint is made that the court refused to submit special findings. We can not find from the record anything going to show that they were refused by the court, and if they were we can not see that the refusal was error. They were two in number and the second one related to matter wholly outside of the issues, as they were finally settled by the court.

Complaint is made of the refusal of instructions asked by the defendant, but the record is silent as to whether they were brought to the attention of the court, and there appears no exception to their refusal, if they were refused. There is nothing to indicate such refusal.

Complaint is made of the third instruction given by the court, which was endeavoring to state the issues raised by the plaintiff's reply. We suppose the point of the objection is that it includes among the issues raised by that reply the making of efforts at settlement for less than the amount of the policy. This is merely stated, as being claimed by the reply, and seems to have been cured by the subsequent instructions of the court as to the effect of such efforts in striking out from the consideration of the jury the \$500 draft. The jury was told to disregard such evidence.

The real question in the case is raised by the objections to the fifth instruction given by the court, which instruction is as follows:

"A party to a contract containing stipulations releasing him from liability thereon, is at liberty, if he sees fit, to not insist on said conditions but to waive the same; but in order that the act of such party shall constitute a waiver, he must act with full knowledge of the existence of the conditions releasing him. And if, with a full knowl-



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edge of the circumstances releasing him, he continues to treat the contract as of binding force and induce the other party to act in that belief, he will be deemed to have waived the conditions releasing him.

"And in this case, if the plaintiff has established by a preponderance of the evidence, that the defendant company was notified of the loss of said barn, and that in pursuance of said notice, it sent to the home of the plaintiff its state agent and adjuster for the purpose of settling and adjusting said loss, and if such adjuster before going to the home of the plaintiff, had full knowledge of the existence of said mortgage, and that the same was placed on the property without the consent of the company and with this knowledge intentionally gave plaintiff to understand that he was willing and ready to pay the loss in full, and induced plaintiff to come from his home to the city of Lexington for the purpose of receiving the pay for said loss, and induced plaintiff to assist in making an estimate of the cost of said building, and induced plaintiff to make and furnish proof of said loss as provided by the terms of said policy of insurance, this conduct by said agent of defendant would be sufficient to establish the claim of plaintiff's that the said condition of forfeiture in the policy had been waived by the defendant company. And if you find that each and all of these facts have been established by a preponderance of the evidence, it would then be your duty to find for the plaintiff in the sum of \$1,000 with interest thereon at seven per cent. from September 29, 1897."

This instruction, however, is not open to the objection urged against it. It does not assume knowledge on the part of the adjuster either as to the existence of the mortgage or as to the non-consent of the company to its being placed upon the property. It does, however, indicate that the facts as to calling for proof of loss which had been testified to by plaintiff would amount to a waiver of the forfeiture, if the adjuster had such knowledge. It is not claimed that this is error. There is certainly evidence



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to sustain the finding of the jury that the adjuster had such knowledge, ample to warrant the court in submitting that question.

The only fact which Mr. Rowntree, the adjuster, claims he did not know in reference to the matter was whether or not a special permission to place this mortgage upon the property had been given. There is certainly evidence in the record tending to show that the defendant had knowledge of the facts amply sufficient to put him upon his guard on this point, among them his procuring a certified copy of the mortgage before visiting the plaintiff, and his own testimony as to the practice of the company in attaching copies of such permissions to the application. It is impossible to conclude that this verdict is not supported by evidence as to the knowledge of defendant concerning the terms of its own contract, and there is no question at all that the facts as to the mortgage had been obtained by Mr. Rowntree from the record before any of these facts which are claimed to constitute a waiver occurred.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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WHITFIELD SANFORD, APPELLEE, V. JOHN ANDERSON ET AL.,  
APPELLANTS.

FILED JANUARY 8, 1902. No. 10,815.

Commissioner's opinion. Department No. 3.

1. **Mortgages: FORECLOSURE: ERROR IN APPRAISAL: EFFECT.** An error, in appraising real estate for judicial sale, whereby a deduction is made for liens that have been satisfied or merged in the decree, is error without prejudice, where the property sold for more than two-thirds its gross valuation.
2. **Mortgages: FORECLOSURE: TIME FOR OBJECTIONS TO APPRAISAL.** All

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objections to the appraisement, to be available, must be lodged before sale.

3. Appeal and Error: JURISDICTION. On the facts stated, *held*, the trial court had jurisdiction to enter the decree assailed.

APPEAL from the district court for Saunders county. Tried below before SEDGWICK, J. *Affirmed*.

*B. E. Hendricks* and *S. H. Sornborger*, for appellants.

*M. B. Reese*, *contra*.

ALBERT, C.

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. The first reason urged for a reversal is, that the appraisers improperly deducted two liens from the gross value of the property; one of which was a tax lien, included and merged in the decree, the other, a mortgage which had been previously satisfied. That these liens were improperly deducted became known at the time of the sale; and the plaintiff, thereupon, bid more than two-thirds of the gross valuation of the property and it was sold to him. As the property was sold for more than two-thirds of its gross valuation, that certain liens were improperly deducted, by the appraisers, worked no prejudice to the defendants. *La Selle v. Nicholls*, 56 Neb., 458; *Bernheimer v. Hamer*, 59 Neb., 733, 82 N. W. Rep., 18.

2. It is next urged, that the tax lien, included in the decree, covered only a portion of the land, and that such portion was not separately appraised. The answer to this is, that no such objection was lodged against the appraisement until after the sale. The rule, settled by an unbroken line of decisions, is, that all objections to the appraisement, to be available, must be made before sale. *Bernheimer v. Hamer*, *supra*.

3. It is urged, lastly, that as the decree is based, in part, on a cross-petition, filed after the answer day, and as no summons issued thereon, the court had no jurisdic-

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tion over appellants, as to such cross-petition, and the decree based thereon, for that reason, is void. The rule invoked by appellants has no application to the facts in this case. The appellants filed a demurrer to plaintiff's petition; while a demurrer was pending, the cross-petition was filed; the demurrer was submitted to the court on the same day the cause was submitted on the petition, cross-petition and the evidence; a stay was taken at the request of one of the appellants; both joined in resisting confirmation. Under such circumstances, they cannot be heard to complain of a lack of notice of the filing of the cross-petition. They submitted themselves to the jurisdiction of the court, and the decree is valid.

We recommend that the order of the district court confirming the sale be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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A. A. DAVIS ET AL., APPELLEES, V. JOSEPH GREENWOOD ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,818.

Commissioner's opinion. Department No. 3.

**Mortgages: FORECLOSURE: RIGHTS OF SECOND MORTGAGEE NOT A PARTY.** G. held a first mortgage and D. and F. a second mortgage on certain town lots. G. foreclosed his mortgage, but failed to make D. and F. parties to the action. Prior to any sale under the decree of foreclosure D. and F. procured a conveyance of the lots from the owner in full satisfaction of their mortgage and went into possession. They also entered into a verbal agreement with G. by the terms of which they were to pay him, on a certain specified date in the future, the full amount of his decree, together with costs of the action and the attorney's fee therein incurred, and to make a deed to G. conveying to him the lots as security for the performance of the agreement on their part, G. to reconvey to them when payment was made. *Held*, That D. and F., not being made parties to the action of foreclosure instituted by G., had a legal right to redeem from his mortgage by paying the amount of his decree, and that the agreement above set out was simply

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an agreement to give D. and F. the right to redeem on the terms therein mentioned without an action brought for that purpose and that it could be enforced although not in writing. The defendant in his answer having admitted the agreement as claimed by the plaintiffs, has waived the statute even if the contract was obnoxious thereto. *Connor v. Hingtgen*, 19 Neb., 472.

APPEAL from the district court for Dixon county. Tried below before EVANS, J. *Affirmed.*

*W. E. Gantt and A. E. Barnes*, for appellants.

*McCarthy & McCarthy*, contra.

DUFFIE, C.

On March 27, 1896, Joseph Greenwood, one of the appellants, was the owner of a mortgage on lots 23 and 24, in block 5, in the village of Emerson, Nebraska, made to secure the sum of \$300, and which was a first lien on said lots. The appellees, A. A. Davis and I. J. Fuller, were the owners of a second mortgage on said lots made to secure the payment to them of the sum of \$250. On the date above mentioned, Greenwood commenced an action in the district court for Dixon county, to foreclose his mortgage, but omitted to make Davis and Fuller, the second mortgagees, parties to such foreclosure proceedings. April 29, 1896, a decree of foreclosure was entered by the court, the amount found due being the sum of \$350 which was to draw ten per cent. interest from that date. On January 28, 1897, Davis and Fuller took from William Kellogg, the owner of the lots, a conveyance thereof in full satisfaction of their mortgage, and they allege that on the same day they entered into an oral agreement with Greenwood in effect as follows: They were to pay the taxes due on the land, together with the costs made in the foreclosure proceedings including an attorney's fee of \$25, and on the first day of October, 1897, they were to pay him the amount of his decree with ten per cent. interest thereon, which was computed and found to be \$401.37. On the payment of these several sums,

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Greenwood was to give them a quitclaim deed of the lots, and to secure him the payment of said sums, they made to him a deed of the premises, thus vesting him with full title thereto. On the same day it is alleged they paid the sum of \$50 being the amount of taxes due on the lots, the costs in the foreclosure case instituted by Greenwood, and the attorney's fee agreed upon, and they afterward executed to Greenwood a conveyance of the premises. October 1, 1897, they tendered to Greenwood the sum of \$401.37, and demanded from him a conveyance of the lots, which he refused, and thereafter and prior to the commencement of this action Greenwood conveyed the lots to his sister and co-defendant, Mrs. Lussier.

November 19, 1897, Davis and Fuller filed their petition in this cause setting out all of the foregoing facts, and the further fact that they had taken possession of the lots in controversy on January 28, 1897, and were then in possession, and asking that the deed from Greenwood to his sister be cancelled and that he be required to convey to them. Greenwood in his answer does not deny the agreement as set out by the plaintiffs, except that he insists that in addition to the payment of the decree with interest thereon, and the taxes, costs and attorney's fee, the plaintiffs were to turn over to him the possession of the premises. We copy the third paragraph of his answer:

"Further answering the defendant denies that he ever entered into a contract with the plaintiffs as set out in paragraphs three and four of plaintiffs' petition, but avers the facts to be that he did agree on or about the 28th day of January, 1897, to allow the plaintiffs to redeem said property for the amount due him, namely, the sum of \$350 and interest at ten per cent. thereon, provided the said plaintiffs would procure the title to said premises and convey the same to this defendant and also turn over to this defendant the possession of said premises for defendant's use and benefit, and that upon the payment to this defendant on or before the 1st day of October, 1897,

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the sum of money due him against said premises that he would reconvey to the said plaintiffs said premises and turn the same over to them. Defendant avers that the plaintiffs failed, neglected and refused to turn over the possession of said premises as agreed upon, but kept the same themselves and have maintained possession of said premises ever since, collecting the rents and profits therefrom which rents and profits they have failed to account for or turn over to this defendant."

The district court found the facts as alleged by the plaintiffs, and entered a decree cancelling the deed made by Greenwood to his sister and ordering him to convey the lots to the plaintiffs upon their paying into court within twenty days, the sum of \$350 with ten per cent. interest thereon from the 29th of April, 1896, or upon the immediate payment by them of the sum of \$441. From this decree the defendants have appealed.

It is first insisted that no agreement was ever consummated between the parties as alleged by the plaintiffs. In the face of the third paragraph of the answer above set out, we cannot understand this claim. Both parties by their pleadings assert an agreement concerning these lots, and it is quite plain to us that the only difference between them is the claim made by Greenwood that he was to be given possession of the property and to have the rents and profits arising therefrom in addition to being paid the amount found due him in the decree of foreclosure, with ten per cent. interest thereon, together with costs and attorney's fees. The district court found against him, as we think, on ample evidence going to show the agreement as claimed by the plaintiffs and it was not until this finding was made that he takes the position that no agreement was ever consummated.

The statute of frauds is urged on the argument as an obstacle standing in the way of affording relief to the plaintiffs. This is an objection not urged in the lower court, nor can we see that there is any merit in the claim. The plaintiffs held a second mortgage on the lots in

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question. Greenwood in his foreclosure proceedings did not make them parties. A sale under this decree would not pass good title, for the reason that the plaintiffs, not being foreclosed of that right, might at any time during the life of their mortgage redeem from Greenwood or the purchaser at his foreclosure sale. In this condition of affairs, the parties met and confessedly made an agreement respecting their rights in the premises. That agreement was so far perfected that the plaintiffs paid part of the consideration, took possession of the lots, and executed to Greenwood a conveyance thereof as security that they would pay him the balance due under the agreement. The whole effect of this agreement was simply to give the plaintiffs the privilege of redeeming the Greenwood mortgage without an action brought for that purpose. That they had the legal right to redeem by suit is unquestioned; that an oral agreement based upon a sufficient consideration allowing them to redeem without suit brought for that purpose, but upon condition made by the parties themselves, is obnoxious in any way to the statute of frauds, we do not believe. But should we be mistaken in this view of the case, the decree should be upheld for another reason. It was held in *Connor v. Hingtgen*, 19 Neb., 472, that "where the defendant in his answer admits substantially the contract set out in the petition, but alleges that the plaintiff has violated its provisions, and there is no plea of the statute of frauds, the statute will be considered as waived." In either view of the case, we are satisfied that the decree of the district court is right, and recommend its affirmance.

AMES and ALBERT, CC., concur.

AFFIRMED.

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LAURA J. MCKEE, APPELLEE, v. JOHN MCKEE, APPELLANT.

FILED JANUARY 8, 1902. No. 10,819.

Commissioner's opinion. Department No. 2.

1. **Divorce: GROUNDS: EVIDENCE.** Evidence examined and *held* sufficient to sustain a decree of divorce on the ground of extreme cruelty.
2. **Divorce: ALIMONY: RULE GOVERNING AMOUNT.** While there is no fixed rule for determining the amount of alimony to be awarded under section 22, chapter 25, Compiled Statutes, such award should bear a reasonable relation to the husband's ability to pay, as disclosed by the evidence.
3. **Divorce: ALIMONY: CIRCUMSTANCES AFFECTING AMOUNT.** In awarding alimony, the court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came, and how far, if at all, the wife contributed thereto. *Zimmerman v. Zimmerman*, 59 Neb., 80.

APPEAL from the district court for Johnson county.  
Tried below before LETTON, J. *Modified and affirmed.*

*S. P. Davidson*, for appellant.

*W. H. Giffen* and *Francis Martin*, contra.

POUND, C.

This is an appeal from a decree of divorce rendered in a suit brought by Mrs. McKee against her husband in which she sought such relief upon the ground of extreme cruelty. The court awarded alimony to the amount of \$1,500 and also \$150 attorney's fees. It would subserve no useful purpose to set forth the evidence in detail. There is a square conflict between Mrs. McKee on the one hand and her husband and his son by a former marriage on the other. Certain of the neighbors in a measure corroborate the plaintiff. The credibility of these witnesses and the weight to be given to their testimony could best be judged in the lower court. The plaintiff's evidence, if believed, is entirely sufficient to make out a



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case of extreme cruelty and to sustain the findings and decree.

With respect to the amount of alimony awarded, however, we are not entirely satisfied with the decree rendered. No claim was made for dower in the husband's lands under section 23, chapter 25, Compiled Statutes, so that, although it was suggested in *Walton v. Walton*, 57 Neb., 102, that extreme cruelty would be "misconduct" within the purview of that section, the award of alimony must be governed by the provisions of section 22. *Tatro v. Tatro*, 18 Neb., 395; *Walton v. Walton*, 57 Neb., 102. That section provides that the court shall allow "such alimony \* \* \* as it shall deem just and reasonable, having regard to the ability of the husband, and the character and situation of the parties, and all other circumstances of the case." It has often been said that there are no fixed rules for determining the amount of alimony to be awarded under this section (*Smith v. Smith*, 19 Neb., 706; *Heist v. Heist*, 48 Neb., at page 798), and even that to warrant interference by this court there must have been "an evident abuse of discretion" on the part of the court below. *Wilde v. Wilde*, 37 Neb., 898. But in the statute itself and in most of the adjudications thereon it is also laid down that the alimony awarded should bear a reasonable relation to the amount and value of the husband's property, and we think it clear that the husband's ability to pay, as disclosed by the evidence, must be taken into account as one of the chief circumstances controlling the court's discretion. *Zimmerman v. Zimmerman*, 59 Neb., 80. In that case the court holds that the considerations which are to be taken into account in awarding alimony are the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came, and how far, if at all, the wife contributed thereto. Mrs. McKee was the defendant's second wife. They had no children, while he had one child by his former marriage. She appears to be in robust

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health, had been supporting herself before marriage, and did, at least, the ordinary work of a farmer's wife while living with her husband. The defendant owned the bulk of his property before marriage. She brought very little, and her contribution to the rise in values, which we know has been general, can not have been large. As to the value of his property, the testimony is not as satisfactory as it might be. The principal item is a farm of one hundred and twenty acres, variously estimated as worth from \$25 to \$45 per acre. He claims to owe some \$2,100 while other witnesses testify that he boasted of owing nothing and that he even loaned money. The alleged indebtedness is to defendant's father and brother, and only \$1,000 of it is shown very convincingly. Taking the whole testimony together, however, remembering that she has received all the household goods that she cared to take, we are constrained to think that the award of \$1,500 alimony, coupled with \$150 for attorney's fees is too much. Although there is ample testimony to sustain the findings and although no amount of provocation would justify the rough and cruel treatment charged and regarded as proved by the trial judge, we cannot but feel that the plaintiff should bear her fair share of the blame for the domestic difficulties in question. By her own account, her life as a farmer's wife was not an easy one in its ordinary course, and had no difficulties arisen, she would have had to work hard in the situation and circumstances in which the parties were placed. Considering these circumstances, which seem to be within the purview of the last clause of section 22, the duration of the marriage, the fact that defendant has a child to support, her age and ability to support herself, the value of the property as disclosed in evidence, the fact that the property was acquired almost entirely before marriage, the proved indebtedness of \$1,000, and the amount of attorney's fees allowed, we think \$1,000 as much as the defendant may well be asked to pay.

We therefore recommend that the decree be modified by

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reducing the amount of alimony awarded from \$1,500 to \$1,000 and that the decree so modified be affirmed. We also recommend that each party pay his own costs in this court.

SEDGWICK and OLDHAM, CC., concur.

The decree of the district court is modified by reducing the amount of alimony awarded from \$1,500 to \$1,000, and the decree, so modified, is affirmed, each party to pay his own costs in this court.

MODIFIED AND AFFIRMED.

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THE FREMONT PACKAGE MANUFACTURING COMPANY, APPELLEE, v. P. C. STOREY ET AL., IMPLEADED WITH N. A. RAINBOLT ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,826.

Commissioner's opinion. Department No. 2.

**Creditors' Suit: INSOLVENT CORPORATIONS: UNPAID SUBSCRIPTIONS: PARTIES.** When a bill in equity is filed by the creditors of an insolvent corporation for the purpose of subjecting the unpaid subscriptions to the capital stock of such corporation to the payment of the corporate debts, it is necessary that each one of the delinquent subscribers to such capital stock be made a party defendant; and unless all are made parties defendant, or some good and sufficient reason appears upon the face of the petition, such as death, insolvency, or inability to reach with the process of the court the delinquent subscribers not joined as defendants, the petition is bad because of a non-joinder of parties defendant.

APPEAL from the district court for Madison county. Tried below before ROBINSON, J. *Reversed and certain petitions dismissed.*

*Powers & Hays* and *N. A. Rainbolt*, for appellant, Rainbolt.

*F. P. Wigton*, for appellant, Burrows.

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*Geo. L. Witham*, for intervener, Norfolk State Bank.

*Barnes & Tyler*, for appellee, The Fremont Package Manufacturing Company.

OLDHAM, C.

This was a suit by bill in equity instituted by the Fremont Package Manufacturing Company to recover from the defendants, P. C. Storey, H. W. Brooks, C. B. Burrows, N. A. Rainbolt and D. Rees, the amount of their unpaid subscriptions to the capital stock of the Norfolk Creamery and Commission Company. The substantial allegations of the petition are that the action was instituted in behalf of the plaintiff and all creditors of the Norfolk Creamery and Commission Company; that the said company was a corporation duly organized under the laws of the state of Nebraska. The petition then alleges that the plaintiff procured judgment against the Norfolk Creamery and Commission Company before a justice of the peace and that execution was returned unsatisfied on said judgment; that the corporation is insolvent and has ceased to do business as a corporation. It also sets out the fact that the defendants were subscribers to the capital stock of the corporation and that no part of their stock has been paid and prays judgment against each of the defendants for the amount of his unpaid subscription. The Creamery Package Manufacturing Company, a corporation, and the Norfolk State Bank filed intervening petitions setting up substantially the same facts as those alleged by the plaintiff and asked for similar relief. A demurrer was filed to these petitions alleging misjoinder of both parties plaintiff and parties defendant and that the petition failed to state any cause of action against the answering defendants. The demurrer was overruled and defendants, Rainbolt and Burrows, each filed separate answers alleging, among other things, the misjoinder of parties plaintiff and parties defendant. Defendant, Burrows, also filed an amended answer by

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leave of court, before the trial of the cause and specially pleaded the fact that the judgment of the plaintiff and of the intervener, Creamery Package Manufacturing Company, had each become dormant by reason of the fact that no execution had been issued on either of said judgments for more than five years before the filing of this amended answer and that said judgments had not been revived. Plaintiff and interveners filed replies in the nature of a general denial to the allegations of defendants' answer. Judgment was rendered in favor of the plaintiff and each of the interveners against defendant, Rainbolt, for the sum of \$2,000, the amount found by the court to be due from him on his unpaid subscription, and also judgment was rendered for \$500 in favor of the same parties against defendant, Burrows, the amount found by the court to be due from him on his unpaid subscription. There was a finding in favor of defendant, Rees, on his answer denying that he had subscribed for any stock in the corporation; but there appears to have been no finding of any kind with reference to defendants, Storey and Brooks. From this judgment of the district court defendants, Rainbolt and Burrows, have prosecuted an appeal to this court.

This court has held by a well defined line of decisions that an action of this nature can only be maintained when prosecuted for the benefit of all the creditors of an insolvent corporation against all the stockholders of such insolvent corporation whose subscriptions are unpaid. *Farmers Loan & Trust Co. v. Funk*, 49 Neb., 353; *German National Bank v. Farmers & Merchants Bank*, 54 Neb., 593; *Van Pelt v. Gardner*, 54 Neb., 701; *Hastings v. Barnd*, 55 Neb., 93; *Pickering v. Hastings*, 56 Neb., 201. The orderly and proper method of procedure in an action of this nature is by a suit instituted by a receiver of the insolvent corporation for the benefit of all the creditors and against all the delinquent stockholders. While this court has intimated that the action may be brought either by a receiver or by a creditor for the benefit of himself and

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all the creditors, we think the practice of first procuring the appointment of a receiver before the action is brought much preferable as it at once sets at rest all question as to the proper joinder of parties plaintiff in the cause of action.

In the case at bar it is objected to the petition that there is no allegation that there are any other creditors than the plaintiff, although the petition purports to be filed on behalf of plaintiff and all other creditors of the insolvent corporation. Without expressing an opinion as to the sufficiency of this objection we think it would have been well for the pleader to have made some allegation that would have disclosed to the court what, if any, knowledge it had as to the existence of the claims of other creditors against this corporation. A more serious question is presented as to the sufficiency of the petition by the objection raised by demurrer, and saved in the answer, as to the misjoinder of parties defendant. There is no allegation in the petition that the defendants sued were all the stockholders of the insolvent corporation whose subscriptions were unpaid; and when plaintiff and interveners for the purpose of sustaining the allegations in the petition introduced the stock subscription of the insolvent corporation it disclosed the names of three of the subscribers for this stock whose subscriptions appear as unpaid in the same manner as that of the defendants who were sued. No reason is attempted to be assigned in plaintiff's petition for the failure to join these parties as defendants in this cause of action. Under the rule established in this state this action must be brought against all the delinquent stock subscribers and if all are not made parties defendant a good and sufficient reason should be set forth in the petition for not doing so to warrant a recovery against any. The rule established in this state is supported by strong authority in the decisions of other states, and commenting upon this rule the supreme court of Michigan in *Dunston v. Hoptonic Co.*, 83 Mich., at page 384, says: "This seems to be the rule as established

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by the great weight of authority, and I think is the just, reasonable, and equitable one. Any other rule would permit the creditors of the corporation to select one or only a few of the stockholders within the jurisdiction, and compel payment by them of all the debts of the corporation, at least up to the unpaid balance of their subscription, and such subscribing stockholders, in order to compel the others to contribute, would be remitted again to the courts, thus leading to a multiplicity of suits." To the same effect is the holding in *Adler v. Manufacturing Co.*, 13 Wis., 57; *Clarke v. Cold Springs Opera House Co.*, 59 N. W. Rep. [Minn.], 632; 3 Thompson, Corporations, section 3493.

We think there is no escaping the conclusion that when a bill in equity is filed by the creditors of an insolvent corporation for the purpose of subjecting the unpaid subscription to the capital stock of such corporations to the payment of the corporate debts, it is necessary that each one of the delinquent subscribers to such capital stock be made a party defendant; and unless all are made parties defendant, or some good and sufficient reason appears on the face of the petition, such as death, insolvency or inability to reach with the process of the court the delinquent subscribers not joined as defendants, the petition is bad because of a misjoinder of parties defendant. As this will dispose of the case the objection urged against two of the judgments alleged on by plaintiff and one of the interveners, that the judgments had become dormant during the pendency of the suit and before trial, need not now be determined.

It is therefore recommended that the judgment of the district court be reversed and that the petition of the plaintiff, The Fremont Package Manufacturing Company, and the intervening petitions of The Creamery Package Manufacturing Company and the Norfolk State Bank, be dismissed.

SEDGWICK and POUND, CC., concur.



Rumley Co. v. Jelsma.

The judgment of the district court is reversed and the petition of the plaintiff, The Fremont Package Manufacturing Company, and the intervening petitions of The Creamery Package Manufacturing Company and the Norfolk State Bank, are dismissed.

REVERSED AND CERTAIN PETITIONS DISMISSED.

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M. RUMLEY COMPANY V. JOHN JELSMA ET AL.

FILED JANUARY 8, 1902. No. 10,843.

Commissioner's opinion. Department No. 1.

**Appeal and Error: REPLEVIN: EVIDENCE: SUFFICIENCY.** Evidence examined and *held* in part to sustain the verdict and judgment.

ERROR from the district court for Gage county. Tried below before STULL, J. *Affirmed upon remittitur.*

*Frank J. Kelley*, for plaintiff in error.

*L. C. Burr, Hazlett & Jack and Griggs, Rinaker & Bibb, contra.*

DAY, C.

On July 1, 1898, M. Rumley Company brought this action in the district court for Gage county against John Jelsma, and others, to recover the possession of certain personal property, consisting of a twelve horse power traction, a separator and wagon, a straw stacker and other fixtures belonging thereto, all of which were particularly described in the petition and affidavit. The plaintiff claimed the right of the immediate possession of the property by virtue of a chattel mortgage held by it, the conditions of which, with reference to certain payments, the plaintiff alleged had been broken. The answer was a general denial. The property was delivered to the plaintiff under the writ of replevin and by it con-



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verted into money. Upon the trial the jury found that the right of property and the right of possession of the property described in the petition was in the defendants, and found the value of the property to be \$1,875 and assessed the defendants' damages for the unlawful detention of the property at \$1,000. The motion for a new trial was overruled and judgment entered on the verdict, to review which the plaintiff brings error to this court. The principal error complained of by the plaintiff upon the argument was that the verdict and judgment are not supported by sufficient evidence. The mortgage was given to secure a number of notes maturing at different times, two of which appeared upon the face of the instrument to be due at the time of the bringing of the suit. One of the notes by its terms matured November 1, 1897, and the other, December 1, 1897. It was contended by the defendants that the time of payment of all the notes had been extended one year from the date of their maturity. The evidence tended to show that in August, 1897, the plaintiff became alarmed upon some information it had received, that the property was about to be removed from the state and took possession of the property and moved it some miles from where the defendants were at the time using it. This difficulty was adjusted between the parties a few days later and the property returned to the defendants. The defendants claim that at this time, in consideration of their waiving damages sustained by being deprived of the use of the property, it was agreed between plaintiff and defendants that the time of payment on all of the notes be extended one year from the date of their maturity, but that meanwhile the defendants would pay such sums on the notes as they could spare.

Upon the question as to whether there had been an extension of the time of payment there was a direct conflict in the evidence. If the time of payment had been extended then there was no breach of the condition of the mortgage. In finding for the defendants the jury must necessarily have found that the time had been extended.

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There was sufficient evidence, we think, to support this finding; and under the well established rules of this court the finding of the jury will not be disturbed. The jury also found the value of the property taken to be \$1,875. Upon this question there was, likewise, a conflict in the evidence, the defendants' two witnesses placed the value at \$1,875 while the plaintiff's witness placed it at \$1,000. There was ample testimony to support this finding of the jury.

For the wrongful detention of the property by the plaintiff, the jury awarded defendants \$1,000. This was based upon evidence of the defendants, that by being deprived of the machine they had lost certain profits which they otherwise would have made. There was no statement of facts from which the jury was warranted in finding that defendants' damages for detaining the property was \$1,000. The defendants were permitted to show that during the season of 1897, the profits from running the machine were \$500 and that more wheat was grown in the state in 1898 than in the previous year; they had no contracts for work for the season of 1898 which could be enforced and but few promises of jobs. The profits for the season of 1898 under the facts shown were too remote and speculative to form the basis for estimating damages. While it may be true as contended for by the defendants, that the profits which would have accrued to the defendants during the season of 1898, constitute the defendants' damages for the wrongful detention of the property, yet in order to make the profits a basis for the damages it must be shown that the profits would reasonably and naturally follow from certain facts proved. The law will not permit the jury to go into the realms of conjecture and award damages without proof of facts from which such damages might reasonably be expected to follow. That portion of the verdict awarding the defendant \$1,000 for the wrongful detention of the property is not sustained by any competent evidence. We therefore recommend that unless the defendants

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within twenty days from the filing of this opinion, file a remittitur of \$1,000 with interest thereon from the date of the judgment, that the judgment be reversed.

HASTINGS and KIRKPATRICK, CC., concur.

Unless the defendants file a remittitur of \$1,000 within twenty days from the filing of this opinion with interest thereon from the date of the judgment, the judgment of the district court will be reversed, otherwise it will be affirmed.

AFFIRMED UPON REMITTITUR.

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JOHN STEWART & CO. LIMITED, APPELLANT, V. EUGENE F. ALLEN ET AL., APPELLEES.

FILED JANUARY 8, 1902. No. 10,853.

Commissioner's opinion. Department No. 2.

1. Appeal and Error: ERRORS IN EXCLUDING EVIDENCE, ON APPEAL. Alleged errors of the trial court in the exclusion of evidence can not be examined on appeal.
2. Appeal and Error: EVIDENCE: SUFFICIENCY. Evidence examined and held sufficient to sustain the judgment.

APPEAL from the district court for Custer county. Tried below before GRIMES, J. *Affirmed.*

*Flansburg & Williams*, for appellant.

*R. E. Brega, L. E. Kirkpatrick and Jno. S. Kirkpatrick*, contra.

OLDHAM, C.

This was a suit to foreclose a real estate mortgage made and executed by Eugene F. Allen and wife to the Dakota Mortgage Loan Corporation and alleged to have been indorsed by said corporation before maturity, for a valuable consideration and in the ordinary course of business

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to the plaintiff. Defendant, Caldwell, filed a separate answer to this petition admitting that defendant, Allen, and wife, had executed the note and mortgage sued on to the Dakota Mortgage Loan Corporation, which subsequently changed its name to the Globe Investment Company, but alleged that defendant, Allen, had paid the note and mortgage in full at maturity to the Globe Investment Company and that said mortgage was duly released by said Globe Investment Company, and that after the release of said mortgage he purchased the lands in controversy free of all liens and incumbrances. He also denied that plaintiff was the owner of the note and mortgage and denied that it was purchased by the plaintiff before maturity for any consideration. Plaintiff replied denying the allegations of defendant's answer.

It was admitted that defendant, Allen, paid the note and mortgage in full to the Globe Investment Company at the time and place of its maturity. Plaintiff then offered in evidence the indorsement on the note of the Globe Investment Company, formerly the Dakota Mortgage Loan Company, which was excluded by the trial court. Plaintiff then offered depositions tending to prove the purchase and indorsement of the note. These were all excluded by the trial court and judgment entered as follows: "And this cause came on further to be heard, upon the evidence being submitted to the court, finds that the note and mortgage in suit were paid in full to the Globe Investment Company, formerly the Dakota Mortgage Loan Corporation, the payee of said note, at the place of payment in Boston, Massachusetts. That the indorsement on the note is not sufficient to transfer the legal title to the plaintiff, so as to make the plaintiff an innocent holder for the value, so as to cut off defenses. To which findings the plaintiff excepts. It is therefore considered, adjudged and decreed by the court, that the defendant go hence without day, and that this cause be and the same is hereby dismissed at the costs of plaintiff. To all of which plaintiff excepts."

Plaintiff now seeks to have this judgment reversed on

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appeal. It is a rule of practice in this court so well established that it might be designated as elementary that alleged errors of the trial court in the exclusion of evidence can only be reviewed on error proceedings and can not be reviewed on proceedings on appeal, hence we can only examine this judgment by the light of the pleadings, and the evidence which was admitted by the trial court. *Ainsworth v. Taylor*, 53 Neb., 484; *Scroggin v. National Lumber Co.*, 41 Neb., 195; *Zimmerman v. Zimmerman*, 59 Neb., 80. The answer denies the ownership and purchase of the note by the plaintiff. The evidence admitted shows that the note was paid in full at maturity at its place of payment to the Globe Investment Company. The evidence offered tended to show the indorsement of the note to the plaintiff by the Globe Investment Company was excluded and as we are precluded by the rule governing proceedings on appeal from examining the action of the trial court in excluding this evidence we can see nothing to do but to recommend that the judgment of the trial court be affirmed because the judgment is fully supported by the pleadings and evidence which was admitted, and it is so recommended.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

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THE NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V.  
ANNA C. CRANDALL ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,856.

Commissioner's opinion. Department No. 1.

1. **Mortgages: FORECLOSURE: OBJECTIONS TO APPRAISAL.** "An appraisement duly made of real estate for the purposes of a judicial sale can not be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisement it must be challenged for fraud." *Brown v. Fitzpatrick*, 56 Neb., 61.
2. **Appeal and Error: PRESUMPTION FROM RECORD.** Where no part of the record prior to an *alias* order of sale on which property is sold is

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brought to this court on an appeal from an order of confirmation, no irregularity or lack of authority to issue such *alias* order can be presumed.

3. **Mortgages: FORECLOSURE: SWEARING APPRAISERS BY DEPUTY.** A certificate that appraisers were sworn by the sheriff by a deputy, *held*, to sufficiently indicate that the deputy performed such services.

APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

*Daniel F. Osgood*, for appellants.

*S. L. Geisthardt*, *contra.*

HASTINGS, C.

In this case, which is an appeal from the confirmation of a foreclosure sale, the first objection is that the appraisement is too low. No objection to the competency of the appraisers and no allegations of fraud are made. It seems the settled conclusion of this court that objections to an appraisement solely on the ground that it is too low are not to be entertained. *Brown v. Fitzpatrick*, 56 Neb., 61.

The next objection urged is that the *alias* order of sale, under which the property sold, was irregularly issued. As to this there is absolutely nothing in the record to indicate whether or not such is the case, and, of course, the action of the lower court must be presumed regular. None of the proceedings in the case prior to the issuing of the *alias* order of sale have been brought up, and whether they were regular or irregular cannot be ascertained by so much of the record as we have here.

The objection mainly relied upon seems to be that the return which states that the appraisers were sworn is signed "John J. Trompen, sheriff, by Nicholas Ress, deputy." It is claimed that this return indicates that the sheriff himself swore the parties and that Mr. Ress cannot certify that he did so. We do not so understand the return. It seems to us to mean that the whole transaction was by Mr. Ress acting as deputy for the sheriff.

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It is recommended that the action of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

**AFFIRMED.**

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**FARMERS LOAN & TRUST COMPANY, APPELLANT, v. BYRON  
R. HASTINGS ET AL, APPELLEES.**

FILED JANUARY 8, 1902. No. 10,860.

Commissioner's opinion. Department No. 2.

1. **Taxation: LEVYING SPECIAL ASSESSMENTS: STATUTORY CONSTRUCTION.** Statutory provisions as to the manner of levying special assessments must be strictly complied with.
2. **Appeal and Error: QUESTIONS NOT RAISED BY BRIEFS.** On appeal this court is not bound to pass upon questions not fairly raised in the briefs of counsel for appellant.
3. **Appeal and Error: VALIDITY OF STATUTES: GENERAL STATEMENTS IN BRIEFS.** Where several special assessments were found to be invalid in the lower court and the validity of such assessments depends upon statutes now repealed so that to pass upon them will require a minute investigation of documentary evidence and laborious search for the several statutes applicable thereto, assertions in appellant's brief that such assessments are valid and are shown by the proof to be valid, without stating any reasons for such opinion, or affording any material assistance to this court toward verifying it, do not require review of such findings.

APPEAL from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

*W. A. Saunders*, for appellant.

*J. W. Woodrough* and *Wm. D. Beckett*, contra.

**POUND, C.**

Appellant is here complaining of a decree in a suit to foreclose certain tax-liens, wherein the court granted the relief prayed for as to the general taxes set up in the petition, but found a number of special municipal assessments, under which liens were claimed, to be invalid and denied fore-

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closure therefor. In appellant's brief four propositions are laid down, with two of which we can have no quarrel. That the plaintiff may include in his suit as many tracts of land upon which he claims a lien as the defendant may own and that his suit is not barred by limitation till the expiration of five years from the period of redemption as fixed by statute, we do not doubt. But we find nothing in the findings or decree of the lower court running counter to these rules in any way. With respect to the further propositions advanced, that a certificate of tax sale is *prima facie* evidence of the regularity and validity of all taxes, both general and special, included in the sale, and that "in an action for the foreclosure of a tax certificate technical defenses will not be considered," we must make certain distinctions. This cause arose before the recent provisions of municipal charters in this state as to sales for special assessments, and is to be governed by the decision in *Leavitt v. Bell*, 55 Neb., 57. In that case the court said: "Where a lien is sought to be enforced or foreclosed for general taxes, then, doubtless, the presumption is that the statutes in reference to the levy and assessment of these taxes, and the sale of the real estate for their non-payment, have been complied with, and the burden of showing irregularities, or that such a tax is void, is upon the party asserting the fact. *Adams v. Osgood*, 42 Neb., 450. But no such presumption can be indulged when a lien is sought to be enforced against real estate for a sale made thereof for the non-payment of special taxes or assessments. In such a case, he who asserts the lien and seeks to enforce it has the burden of showing the validity of the tax lien. *Smith v. City of Omaha*, 49 Neb., 883." It has been repeatedly held, also, and is well settled, that the several provisions of the statutes with reference to special assessments must be strictly adhered to, and that such assessments are invalid if not levied in full compliance therewith. *Batty v. City of Hastings*, 63 Neb., 26, 88 N. W. Rep., 139, and cases cited.

It appears from the pleadings that the several special



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assessments involved were levied at various times and for various purposes under different provisions of statutes not now in force. To pass upon their validity, in view of the well settled rule already stated, requires minute investigation of documentary evidence and laborious search for the several statutes and sections of statutes applicable thereto. This court, as it has often said, is not bound to pass upon questions not fairly raised in the briefs of counsel for appellant. To raise a point in a brief is to do something more than make a bare assertion that a finding or a ruling of the district court is wrong. Where the matter is so simple that the ruling speaks for itself or the mere statement of the finding condemns it, no more may be requisite. But where statutes not now in force are to be examined, sections thereof not readily accessible and dealing with matters not of ordinary occurrence are to be referred to, and critical examination of records and proceedings in the light of such statutes is to be had, it will not do to stop with a statement of counsel's opinion that the finding or ruling is wrong. The brief states that the special assessments in question are valid, and that they are shown to be valid by the proof. But it does not refer us to the statutes involved, says nothing whatever as to the reasons stated in the decree as those upon which the lower court found to the contrary, and, in fact, affords us no material assistance toward verifying such opinion. We do not think we ought to be asked to review the findings in question under such circumstances.

Nevertheless, being unwilling to refuse a party relief to which he may be entitled, upon what might be thought hypertechnical grounds, we have examined the notices which the lower court held indefinite and insufficient, and are of opinion that the decree is right. In one case the record shows that the board of equalization acted at another and different time from that specified in the notice, and as to all of the notices, without examination of other documents it is wholly impossible for the reader

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to ascertain what property is affected or who is intended to be notified. Such documents are not referred to in the notices, and we are satisfied that they conveyed no actual notice of what was proposed to anyone who read them.

We recommend that the decree be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

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THE KITCHEN BROTHERS HOTEL COMPANY V. PHILIP H. PHILBIN.

FILED JANUARY 8, 1902. No. 10,869.

Commissioner's opinion. Department No. 2.

1. **Landlord and Tenant: COVENANT IMPLIED FROM LEASE.** A covenant for quiet enjoyment of the leased premises is implied from the demise.
2. **Landlord and Tenant: WHAT PASSES WITH LEASE.** A lease of a part of a building passes with it, as incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.
3. **Landlord and Tenant: MATTERS INCIDENT TO LEASE INCLUDED THEREIN.** Where a room on the ground floor of a hotel building was leased to a ticket broker and it appeared that a large portion of his business came from patrons of the hotel who entered his office from the hotel rotunda, *held* that the lease included the use for the lessee's customers of a door and hallway leading from the rotunda to the room leased.
4. **Landlord and Tenant: OBSTRUCTION OF ENTRANCE TO PREMISES: EVICTION.** The use of said door and hallway for the purposes of lessee's business being incident to the lease of the room, an obstruction thereof by the lessor so as to prevent use by the lessee and his customers is an eviction, which the lessee may treat as total or partial at his election.
5. **Landlord and Tenant: PARTIAL EVICTION: COUNTER-CLAIM.** In case the lessee elects to treat the eviction as partial, he may maintain a counter-claim for damages upon the implied covenant for quiet enjoyment, when sued by the lessor on the covenant to pay rent.
6. **Landlord and Tenant: PARTIAL EVICTION: DAMAGES FOR GAINS PREVENTED.** A party may recover for gains prevented where such damages are certain and are the natural result of the wrong complained of.

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ERROR from the district court for Douglas county.  
Tried below before POWELL, J. *Affirmed.*

*George E. Pritchett*, for plaintiff in error.

*William F. Gurley* and *Guy R. C. Read*, *contra*.

POUND, C.

The plaintiff, a corporation owning and operating the Paxton Hotel in the city of Omaha, leased to the defendant a store room upon the ground floor of the hotel building to be used as a ticket broker's office. The room fronted upon the street and had a front door opening thereon, but had also a back door opening into a hallway leading to the hotel rotunda. After the lease had expired, defendant continued in possession as tenant from year to year under the same terms as in the lease. While he was so in possession, apparently in consequence of some dispute, the plaintiff obstructed the hallway in question by a wooden partition and thus deprived defendant of the use thereof and of the back door. It is in evidence that a large portion of the defendant's business came from patrons of the hotel who entered his office from the rotunda by this door and hallway. Accordingly, when sued upon his covenant to pay rent, the defendant by way of counter-claim set up his damages by reason of the obstruction of the hallway and two further claims for damages which we need not consider for the reason that one was taken from the jury in the instructions of the court and the other was evidently not allowed by them in their verdict. Upon the counter-claim in question, however, the jury found for the defendant, and plaintiff is prosecuting error from the judgment rendered thereon.

We are of opinion that the counter-claim was maintainable and that the judgment is right. A covenant for quiet enjoyment of the leased premises was implied from the demise. Taylor, Landlord and Tenant, section 304. Hence any interference with the effective use of the part

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of the building demised which would amount to an eviction in whole or in part, as a breach of such covenant, would be available to the lessee by way of counter-claim when sued on his covenant to pay rent. The use of the back door and hallway was clearly included in the lease. We have recently had occasion to pass on two cases not unlike the one at bar, and have held that a lease of a part of a building passes with it, as incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. *Miller v. Fitzgerald Dry Goods Co.*, 62 Neb., 270, 86 N. W. Rep., 1078; *Herpolsheimer v. Funke*, 1 Neb. [Unof.], 471. Considering the nature of defendant's business, which would make an office in the hotel building desirable because of its accessibility to travelers, patrons of the hotel, the fact that so large a part of defendant's business came from patrons of the hotel who entered his office from the hotel rotunda, and the fact that the room in question had been used for many years preceding as a ticket office and had been reached from the rotunda by the hallway and door in question, it is evident that the use of the back door by defendant's customers was in contemplation of the parties quite as much as the use of the front door, and that this door and hallway were reasonably necessary to the effective use of the part of the building demised. This being so, the obstruction thereof by the lessor, so as to prevent use by the lessee and his customers, was an eviction, which the lessee might treat as total or partial at his election. Taylor, Landlord and Tenant, section 315; *Herpolsheimer v. Funke*, *supra*. The lessor could not insist that the lessee treat it as a total eviction; the latter might properly elect to remain and to sue for his damages upon the covenant for quiet enjoyment. It follows that when sued for rent he might maintain the counter-claim upon which the judgment in question was rendered.

It is argued that the damages claimed for loss of business by reason of the closing up of the door and hallway

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are too remote, speculative and uncertain to be allowable. We think otherwise. It has been thoroughly settled that a party may recover for gains prevented where such damages are certain and are the natural result of the wrong complained of. *Wittenberg v. Mollyneaux*, 59 Neb., 203, 60 Neb., 583. The evidence, like that offered in the case cited, "was the best attainable under the circumstances," and showed a very considerable damage with not a little certainty. The defendant produced his books, showing the amount of his business before and after the act complained of, he showed that his expenses were fixed, he showed the condition of the ticket brokerage business throughout the city during the respective periods, and the inevitable conclusion was that the large falling off of business which his books showed resulted from the cutting off of one of his chief sources of custom, as one would naturally have anticipated.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

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GEORGE W. LEIDIGH V. JOHN H. KEEVER.

FILED JANUARY 8, 1902. No. 10,880.

Commissioner's opinion. Department No. 2.

**Account Stated: EFFECT OF MISTAKE.** Where a settlement is entered into between two parties in reliance on the accuracy and correctness of books of account kept by one of the parties, and it is subsequently discovered that the books have been erroneously kept, and that the party keeping them has not accounted for all the money which he has received, such a settlement will be set aside and a new accounting had although there may have been no intentional fraud practiced by the bookkeeper, and the failure to account may have been due to mistakes alone.

**ERROR** from the district court for Lancaster county.  
**Tried below before HOLMES, J. Reversed.**

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*Broady & Pettis*, for plaintiff in error.

*Wright & Stout* and *Burkett & Greenlee*, contra.

OLDHAM, C.

This was an action in which the plaintiff alleged as his first cause of action that the defendant was indebted to him in the sum of \$1,001.54 for balance due for services rendered by the plaintiff for the defendant from the 3d day of March, 1893, to the 10th day of April, 1896, at the agreed price of \$1,000 per year. As a second cause of action plaintiff alleged that the defendant was indebted to him in the sum of \$300 for money loaned by him to defendant. Defendant answered the allegations in the first count of plaintiff's petition and admitted that plaintiff had performed services for the defendant at the times alleged in plaintiff's petition, but denied that he had ever agreed to pay plaintiff at the rate of \$1,000 per year or any other fixed price for the services so rendered, and alleged that plaintiff's services were not worth to exceed the sum of \$50 per month. Defendant further alleged that during the first two years of plaintiff's employment, plaintiff was engaged in conducting and managing the ice business for the defendant in Nebraska City, Nebraska; that plaintiff kept the books and accounts and collected the proceeds of such business during the time he was so employed; that at the end of each year that plaintiff was so employed in the ice business for the defendant they had a settlement in full of their accounts, and in such settlement plaintiff received all that his services were reasonably worth and all that he claimed of defendant for his services. Defendant further alleged that during the last year that plaintiff was employed by the defendant plaintiff managed defendant's farm and was paid in full for his services by a portion of the crop raised on defendant's farm. Defendant also alleged that at the time he made the settlement with plaintiff for services rendered by plaintiff in the ice business that he relied

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on plaintiff's statements that his books of account had been properly kept, and that after making such settlements he discovered, by an inspection of the books, that plaintiff had misrepresented the accounts and that he had collected a large sum of money from the ice business which he had retained and had not charged to himself on the books. Defendant for answer to the second count of plaintiff's petition admitted that he had borrowed \$300 from the plaintiff, alleged that he had paid \$125 of this money back before he had discovered that plaintiff had deceived him in the manner in which he had kept the books and accounts and admitted that plaintiff was entitled to credit for the remainder of the money, so loaned, on defendant's counter-claim. Plaintiff replied to this answer denying that he had misrepresented the accounts of defendant's ice business or that he had made any false entries in the books of said business or had been guilty of fraud or concealment in the accounts of said business. He admitted that he had an agreement with the plaintiff as to the amount due him at the end of each of the first two years of his employment, but denies that such amount was paid him and alleges that the amount mutually agreed upon, as due to plaintiff, was the same as that charged in the first count of plaintiff's petition. There was a trial to a jury and verdict for plaintiff for the sum of \$1,423.73, and judgment was rendered on the verdict and defendant brings error to this court.

It will not be necessary to discuss each of the numerous assignments of error charged in the petition in view of the conclusion which we shall reach. An examination of the answer, which has been but briefly summarized in our statement of the issues, leads us to the conclusion that it (the answer) added an unnecessary and useless complication to the facts in controversy in the case, and that the confusion of issues tendered by the answer was further mystified by the reply. A careful examination of the pleadings shows that neither of the contending parties relied on a settlement either as a basis of the



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action or the ground of defense. Plaintiff in his petition alleged on a balance due on a contract and not on an account stated. While defendant in his answer sets up two settlements which he alleges were had between himself and plaintiff, yet he immediately follows these allegations with averments of fraud and mistake in the accounts of plaintiff sufficient to avoid the effect of the settlements pleaded. Plaintiff's reply to this answer, technically construed, changes his first cause of action from a suit on a contract to an action on an account stated. All the confusion is with reference to the issues tendered in the first count of the petition. There is no trouble or complaint with reference to the issues tendered on the second count.

The evidence introduced by plaintiff tended to show a contract with the defendant for services rendered at an agreed salary of \$1,000 per year, and a balance due as charged in the first count of the petition. There was no dispute as to the second count of the petition except as to the amount the defendant claimed to have paid on the loan, and, as we have seen, this was properly submitted. The testimony offered by defendant tended to show that plaintiff was only to receive such an amount as his services were reasonably worth during the time that he conducted defendant's ice business and that plaintiff was paid for his services on the farm by a share of the crop raised. Defendant also introduced evidence strongly tending to show that plaintiff had collected a large amount of money from the ice business which either by mistake or with fraudulent intent he had failed to charge himself with on the books which he kept. While there was evidence offered by plaintiff tending to contradict this testimony, yet this evidence was in the record and should have been submitted under a proper instruction to the jury.

The defendant requested an instruction which, we think, would have properly submitted this question to the jury. This instruction was refused by the court, and



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in lieu thereof the court gave paragraph eight (VIII) of instructions on its own motion. This instruction, after properly defining the effect of fraud or mistake on a settlement, contains the following statement: "And it must further appear that the plaintiff made such false and fraudulent representations as to the books of account so kept by him knowing them to be false, and made them with intent to deceive the defendant and that the defendant relied thereon and entered into such settlements upon the faith and in the belief that such statements and representations, so made, were true." We think that this portion of the instruction is clearly erroneous in that it places the burden on the defendant of showing that plaintiff knowingly and intentionally falsified his books. If as a matter of fact plaintiff had received money from the defendant or from the defendant's business and had failed to charge himself with this money, no matter whether he did so ignorantly or intentionally he should now account for this money, and the fact that plaintiff may not have known of the mistake in his books at the time he attempted to settle with the defendant should not excuse him from making his accounting. In *North Nebraska Fair and Driving-Park Association v. Box*, 57 Neb., 302, 77 N. W. Rep., 770, in discussing this principle, HARRISON, C. J., speaking for the court says: "The party who rendered the report or account which formed the basis of the adjustment between him and the association knew all the facts, but did not impart them to the other party. This being true, the adjustment was made under a mistake, even if the element of fraud was absent, and the association could go back of it and collect the amounts due."

As this cause must be tried again on account of the error of the trial court just commented upon, we think it well to suggest that paragraph three (3) of instructions given by the court, as we regard it, fails to clearly define the issues arising on the answer and reply. We think, however, that this confusion of issues might be

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avoided if on a new trial of this cause an amended answer should be filed by the defendant from which settlements not relied on by either party as binding were entirely eliminated and in which the defendant would present, by way of set-off, his claim for moneys alleged to have been collected by plaintiff and not accounted for by him.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for a new trial.

SEDGWICK and POUND, CC., concur.

REVERSED AND REMANDED.

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UNION PACIFIC RAILROAD COMPANY V. CHARLES LOTWAY.

FILED JANUARY 8, 1902. No. 10,883.

Commissioner's opinion. Department No. 3.

1. **New Trial: MOTION FOR: COURTS: ACTION BY JUDGE OTHER THAN ONE WHO TRIED CASE.** A court presided over by the successor of a deceased judge has authority to grant or deny a motion for a new trial in a case tried by the deceased while in office.
2. **Appeal and Error: INSTRUCTION: MATTERS OUTSIDE ISSUES: ESTOPPEL TO COMPLAIN.** That a court has given an instruction covering matters outside the issues made, is not a cause of complaint by a party who has himself requested an instruction substantially the same as that of which complaint is made.

ERROR from the district court for Dodge county. Tried below before GRIMISON, J. *Affirmed.*

*J. N. Baldwin and E. P. Smith, for plaintiff in error.*

*F. W. Button, contra.*

DUFFIE, C.

This action was brought against the Union Pacific Railroad Company to recover damages for the destruction by

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fire of the plaintiff's buildings together with their contents. The petition alleges "that said fire was caused by the negligence and want of proper repair of the locomotive and engines of the defendant, and by carelessness of the agents and servants of said defendant." Among other allegations of the answer is the following:

"Further answering said defendant avers that the engines on all of the trains operated or controlled by it in the state of Nebraska, at or about the date of said alleged fire, were in perfect order and repair, and properly constructed and equipped with all appliances in general use for preventing the escape of fire therefrom, and were managed with care and skill by competent and experienced employees of the defendant appointed therefor, and in charge of said engines; and that the said engines were subjected to and underwent careful and thorough inspection by a competent and skillful person as often as once in every two days before going upon the road, and if any defect was discovered, it was at once thoroughly and perfectly repaired on the said engine before the same was sent out upon the road."

The jury returned a verdict in favor of the plaintiff below in the sum of \$175, upon which judgment was entered, and the railroad company has brought the record here for review. The case was tried before the late Judge Marshall who died before the motion for a new trial was passed on. The motion for a new trial came on to be heard before Judge Grimson who overruled the same and entered judgment on the verdict.

The first assignment urged in the brief of the plaintiff in error is the order of Judge Grimson in overruling the motion for a new trial. It is insisted that the plaintiff in error was entitled to a new trial as a matter of right; that Judge Marshall, who tried the case, having deceased without disposing of the motion, no other judge was qualified to pass upon the evidence, and to say whether the verdict was supported by the evidence; that the appearance and demeanor of the witnesses, their candor, or apparent

prejudice in favor of one party or the other were matters which could not be determined by any one except the trial judge who saw and heard them. While there is much force in this argument, the question has been decided against the contention of the plaintiff in error in the late case of *Goos v. Fred Krug Brewing Company*, 60 Neb., 783.

The court in its ninth instruction told the jury that, "If from the evidence you find and believe that said fire was started and set out by sparks of fire emitted from the smokestack of the defendant's said engine and that they were so emitted by reason of defendant's negligence in not having equipped said engine with a spark arrester, in proper repair, of the most approved kind in general use for locomotive engines, and that by reason thereof, the said sparks of fire were so emitted and thereby kindled and started said fire and burned plaintiff's said property, then the jury in that case should find for the plaintiff."

It is insisted that this instruction is erroneous for the reason that the only negligence complained of in the petition filed was the want of proper repair of the locomotive and engine of the defendant. We were at first disposed to think that the court erred in instructing the jury as above set forth. The only negligence which the plaintiff below alleged against the defendant below was a failure to keep its engines in proper repair. It is nowhere alleged or claimed that the engines were not equipped with the best appliances in general use, and the issue was not made that the company was in any manner negligent in the character of the appliances with which its locomotives were equipped. The complaint and the sole issue tendered by the plaintiff was the negligence of the company in a failure to properly repair its engines. We find, however, that the instruction given by the court was in effect asked by the plaintiff in error. The second request of the plaintiff in error is as follows:

"If you believe from the evidence that the plaintiff's property was injured by fire caused by fire or sparks escaping from defendant's locomotive while passing along

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the railroad in manner and form as charged in plaintiff's petition, then these facts make a *prima facie* case of negligence against the defendant, and the burden of proof is then upon the defendant to rebut this *prima facie* case by showing affirmatively, by a preponderance of evidence, that at the time in question the engine was properly constructed and equipped with improved appliances in general use by railroads for preventing the escape of fire; and that these appliances were all in good repair and condition as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in such repair and condition, and that the engine was carefully and skillfully handled, as regards the escape of fire therefrom, provided the plaintiff was guilty of no fault or negligence contributing to the injury."

A party cannot predicate error upon the action of the court in giving an instruction which he himself requests. Complaint is also made that the verdict is not supported by the evidence. A careful examination of the evidence leads us to believe that under the well known rule of this court the verdict ought not to be disturbed. The evidence that the fire was caused by the engine of the plaintiff in error is not of the most satisfactory character, but we cannot say that there is no evidence sufficient to support it.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

AFFIRMED.

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WILHELM STEIN, APPELLEE, V. MARCUS L. PARROTTE ET  
AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,886.

Commissioner's opinion. Department No. 3.

1. **Mortgages: ASSAILING DECREE IN OBJECTIONS TO CONFIRMATION.** A party will not be permitted to assail the regularity of a decree of foreclosure by objections to confirmation of a sale made thereunder.

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2. **Mortgages: TIME FOR OBJECTING TO APPRAISAL.** Objections to the appraisement of real estate to be sold at a judicial sale, must be lodged before the sale.

APPEAL from the district court for Buffalo county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Hamer & Hamer*, for appellants.

*Dryden & Main*, contra.

ALBERT, C.

This is an appeal from the order confirming a sale of real estate, in pursuance of a decree of foreclosure in which the mortgage was found to be a lien on the premises in controversy, subject only to a certain judgment lien in favor of the defendants, Dryden and Main. The decree did not provide for a sale of the premises in satisfaction of the judgment lien but only for the amount found due on the mortgage. It appears that, at the time the decree was rendered, an appeal was pending in this court from the judgment above referred to, which had been duly stayed by a supersedeas. The objection to the confirmation of the sale, relied upon in this court, is: "That the decree of the court is incorrect in this, that the same finds that the alleged lien of John N. Dryden and Louis P. Main, for the sum of \$2,138.82, is now pending in the supreme court, upon error proceedings, from the judgment of the court; whereas said case is pending on appeal, and a supersedeas bond has been given and approved, and there can be no sale of said premises under said judgment, and this case, by reason of such appeal, must remain undetermined until the alleged lien of the said Dryden and Main is disposed of by the supreme court."

In view of the argument, we are not entirely clear whether the objection goes to the regularity of the decree, or the regularity of deducting the amount of the judgment mentioned from the gross appraised value of the property. In our view of the case, it would serve no useful purpose

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to determine that question, because in either case the objection was properly overruled. It has been repeatedly held by this court that the regularity of the decree cannot be raised in objection to confirmation, and equally as often that objections to the appraisement must be made before the sale. They were not so made in this case. We discover no error on the part of the court in this record, and recommend that the order of confirmation be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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B. M. WEBSTER V. CITIZENS BANK OF OMAHA.

FILED JANUARY 8, 1902. No. 10,887.

Commissioner's opinion. Department No. 2.

1. **Limitation of Actions: ABSENCE FROM STATE: RESIDENCE.** Where a resident of this state against whom a cause of action has accrued removes his residence to another state, but continues his business here and comes to the state openly, notoriously and regularly each business day and there remains during working hours, he is not absent from the state within the meaning of section 20, Code of Civil Procedure, during the period in which he so comes thereto and remains therein.
2. **Limitation of Actions: COMPUTATION OF TIME.** In such case, in determining the period of his absence from the state within the meaning of said section, it is not proper to reckon the aggregate number of hours during which he is out of the state, but, where it appears that he came regularly to his office in the state each working day of the year except for a brief annual vacation, if the aggregate of such vacations and of the days on which he did not come to his office does not extend the statutory period of limitation to or beyond the date of suit, the cause of action is barred.

**ERROR** from the district court for Douglas county. Tried below before SLABAUGH, J. *Reversed.*

*James H. McIntosh* and *Charles A. Goss*, for plaintiff in error.

If, during the time in question, the party was subject to service of process within the state, then the time should be

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computed; if he was not, the time should not be computed, in ascertaining whether or not the statute of limitations had run before the bringing of the action: *Stanley v. Stanley*, 47 Ohio St., 225; *Talcott v. Bennett*, 49 Neb., 569; *Conlon v. Lanphear*, 37 Kan., 431; *Hoggett v. Emerson*, 8 Kan., 262.

*John P. Breen, contra.*

The daily visits to the state by defendant are not, under the statute, to be counted against plaintiff in a computation of time in which his suit must be commenced: *Edgerton v. Wachter*, 9 Neb., 500; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616; *Lane v. National Bank*, 6 Kan., 74; *Harrison v. Union National Bank*, 12 Neb., 499; *Nicholas v. Farwell*, 24 Neb., 180; *Bennett v. Cook*, 43 N. Y., 537; *Bell v. Lamprey*, 57 N. H., 168; *Borroughs v. Bloomer*, 5 Denio [N. Y.], 532; *Rockwood v. Whiting*, 118 Mass., 337; *Whitcomb v. Keator*, 59 Wis., 609; *Armfield v. Moore*, 97 N. Car., 34; 13 Am. & Eng. Ency. Law [1st ed.], 744, note 5.

**POUND, C.**

The Citizens Bank of Omaha, hereinafter referred to as plaintiff, sued Webster, hereinafter styled defendant, upon a check given by the latter to one Johnson on March 8, 1892. Suit was brought March 2, 1899. Whether the suit was upon the check itself, so as to be governed by the five-year limitation, or was not rather for the abstraction of the check from the bank, so as to make the limitation four years, we need not decide. The defendant claimed that he gave it to Johnson, who was one of the officers of the bank, for his accommodation, upon a promise that it should not be presented, and that Johnson afterwards returned it to him as promised. In addition he pleaded the statute of limitations. Judgment was rendered for the plaintiff and the defendant prosecutes error.

Many interesting questions are raised in the record and briefs, but we have not found it necessary to investigate



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more than one. Defendant has maintained an office in Omaha in one of the chief office buildings in that city since 1890. He resided in Omaha when the cause of action accrued, but in December, 1895, removed his residence across the river to Council Bluffs, Iowa. He continued his business in Omaha, however, and from the time of removing his residence until served with process in this cause, regularly came to his office every day but Sunday and there remained during working hours, as he had done since 1890. It is in evidence that he took a brief vacation each year. But except for that, he was always in Omaha during working hours on week days during the whole period in which he maintained his residence across the state line. Under these circumstances, the question is whether plaintiff may avail itself of the last clause of section 20, Code of Civil Procedure, which reads: "If after the cause of action accrues he depart from the state, or abscond, and conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

This is a subject upon which decisions in other states have to be examined with great care in order to ascertain their applicability, since there is a considerable diversity in the various statutes. In a large number of states, the statute provides that if after a right of action has accrued against a person "he shall be absent from and reside out of the state" the time of his absence shall not be taken as part of the period limited for the commencement of the action. In some it is provided that the time of his absence "until he return to reside" in the state shall not be counted. But another type of statute is to be found in Ohio, Kansas, Oregon and Wyoming, and the Nebraska statute is of that type. These statutes omit the words "reside out of," and provide only that if a party departs from the state the time of his absence shall not be computed. The statutes of the several states are classified and the substance thereof stated in Wood, Limitation of Actions [3d ed.], sections 244, 245. Under statutes of the

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former type, it has been settled that the chief criterion is residence. Thus under the former provision of the New York Code, which was of that class, it was held in cases very similar to the one at bar that defendants who lived in New Jersey but spent the whole of business hours on every business day at offices which they maintained in New York city could not avail themselves of the statute. *Bennet v. Cook*, 43 N. Y., 537; *Bassett v. Bassett*, 55 Barb. [N. Y.], 505. This holding was followed also in New Hampshire (*Bell v. Lamprey*, 57 N. H., 168), and in Massachusetts (*Rockwood v. Whiting*, 118 Mass., 337), in which states, however, the statutes used the words be "absent from and reside out of" the state. But the injustice and impolicy of such a rule are so manifest in cases where a person permanently engaged in business in one state and constantly to be found there during the working portion of every business day happens to live across the state line, that New York in 1888 amended her statute by adding the words "and remains continuously absent therefrom for the space of one year or more." As the statute now stands, it is held that one who resides out of the state may none the less claim its protection unless he is in addition to his non-residence continuously absent. *Hart v. Kip*, 148 N. Y., 306, 42 N. E. Rep., 712; *Costello v. Downer*, 19 N. Y. App. Div. Rep., 434; *Connecticut Trust & Safe Deposit Co. v. Wead*, 58 N. Y. App. Div. Rep., 493. The question before us, then, is whether we shall construe our statute to mean "reside out of the state" when it says "depart" and shall construe "absence" as meaning non-residence, or whether we shall recognize some force in the omission of any reference to residence in our statute and give effect thereto. Counsel for plaintiff states his position thus: "When a man changes his residence and domicile to another state he has 'departed' from this state and remains 'absent' within the meaning of this section of our statute until he again takes up his residence within it." In other words, although a man is physically and actually present in a place other than his residence, he is, for the purposes of this statute,

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constructively absent and at the place where he resides. We do not believe that such is the correct interpretation of statutes such as ours, nor do we think statutes which make non-residence an express ground of exception have any bearing thereon. Absence and non-residence are two entirely different things. Thus a man may reside on a homestead in one county, and yet be long absent therefrom and in another county. *Corey v. Schuster*, 44 Neb., 269. Equally he may reside in Iowa, and yet be continuously present in the state of Nebraska accessible to service of summons for many years. This is forcibly illustrated by the decisions under the present statute in New York, where persons resident in New Jersey are yet within the protection of the statute because they have not been continuously absent from New York for one year. The purpose of the statute is practical,—to afford requisite time and facility for reasonably diligent prosecution of claims. If a party resides in the state, it is a proper construction to hold that mere temporary absences do not suspend the statute and that they cannot be tacked one to another so as to prolong the statute. *Blodgett v. Utley*, 4 Neb., at page 30; *Hedges v. Roach*, 16 Neb., 677. In such cases there is no interruption of the possibility of service, since the party is, during each of such absences, open to service at his usual place of residence. But the very considerations that lead to this conclusion under a statute which makes no reference to non-residence except as it may be involved in absence or departure constrain the further conclusion that where a party is actually present in the state every day during the period of limitation and may be served with summons at any time during such period he is not to be deprived of the protection of the statute merely because he resides out of the state, a fact which, of itself, our statute does not regard. This is the established construction of the statute of Kansas, which is like ours in all essential particulars. *Hoggett v. Emerson*, 8 Kan., 262; *Conlon v. Lanphear*, 37 Kan., 431, 15 Pac. Rep., 600. Brewer, J., puts the point very tersely in the former case. The language of

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the statute, is, he says, “‘*Be out of the state,*’ not *reside out of the state*. The question is not one of domicile, but of personal presence. A party may reside in Illinois, and yet spend more than half his time in Kansas.” No express adjudications have come to our attention from any other states having a statute like our own. But a *dictum* of the supreme court of Ohio, passing on a statute which makes no mention of residence, is very suggestive. “Presence of the defendant within the state, *so that he may be sued*, avails in his favor; absence from the state, whether at the accruing of the action or afterwards, suspends the running of the statute.” *Stanley v. Stanley*, 47 Ohio St., 225, 24 N. E. Rep., 493. This is an eminently reasonable view of the intent with which the provision in question was framed. The important practical question is, was the party within reach of process in the state? “The scope and purpose of the entire section,” says Brewer, J., in *Hoggett v. Emerson, supra*, “is to suspend the running of the statute during such periods of time as the debtor is beyond the reach of process from the courts of this state.” The same view was taken in *Blodgett v. Utley*, 4 Neb., 25, where the court considered the proper test to be whether “during that period, the right to proceed in our courts to reduce the claim to judgment is suspended.” And in *Talcott v. Bennett*, 49 Neb., 569, *Hoggett v. Emerson, supra*, was cited with approval in passing on a collateral question. We do not think the several cases where this court has used the word “reside” or “residence” in connection with the section in question are of any weight to the contrary. A person commonly is at his residence, not elsewhere. When one becomes a non-resident, he does not, as a rule, remain in the state. Hence in most cases, so long as absence and non-residence were concurrent, the court, not having its attention directed to the matter, might use one word or the other indifferently. *Edgerton v. Wachter*, 9 Neb., 500, might seem to be more in point. Of this case it must be remarked that it was not properly a decision of the court at all, having been submitted to one of the judges

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by agreement of the parties, the other two being disqualified to sit; that it fails to notice the clear distinction between the provisions of our Code and the general run of such statutes; that it cites cases based upon and construing statutes of another type; that the main argument relied upon, namely, that the statute of limitations cannot run at the same time in two jurisdictions, is obviously fallacious in view of the fact that this is not a question of natural law, but of statutory construction, and whether limitation runs or not in each jurisdiction must depend upon the wording of the statute there in force; and that it proceeds upon the first clause of section 20, not upon the one here in question. Hence we do not think it controlling in this case. We need not consider how far it is a correct construction of the first clause of section 20 because the considerations governing the construction of the words "come into" in that clause and of "depart from" and "absence" in the last clause are not altogether the same. It may well be that where a cause of action accrues in Iowa against a resident of that state, he does not "come into" this state, within the meaning of the statute, until he comes permanently by taking up his residence here, and yet at the same time that one who has always been in the state and continues to keep up his business and to spend the whole of his working hours within our limits, does not depart and is not absent, within the meaning of the next clause, merely because he maintains his home across the state line. We should require something more than this decision to constrain us to an interpretation of the statute, not called for by its words, which would lead to the unfortunate situation from which one state at least has had to extricate itself by express legislation.

If we have correctly interpreted the statute, the time during which the defendant resided in Iowa is not to be deducted from the period of limitation except so far as during that time he was actually absent from the state. It is admitted that he was so absent every Sunday, every night and for short vacation periods each year. How

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are we to reckon the time during which he was absent? Are we to take the number of hours in the statutory period of five years and determine whether or not the defendant was in Omaha that many hours after the cause of action accrued, or are we to take the number of days and ascertain whether the number of days during the five years on which he was not in Omaha openly and notoriously and accessible to service during the working hours thereof, added together, would carry the statutory period up to or beyond the date when this suit was begun. Some *dicta* in *Bennett v. Cook*, 43 N. Y., 537, indicate that the former process might be admissible, and plaintiff's counsel has framed his argument accordingly. But the remarks in question are *obiter* and not argued or apparently much considered. We cannot agree that they afford a proper method of reckoning. The statute ought to be given a common sense construction to further its obvious purpose. The night hours during which the defendant was in Iowa were not necessary or of any utility to anyone who wished to sue defendant so long as he was notoriously at his office in Omaha throughout the working hours of the day through the entire year. No one was hindered or obstructed in getting service on him by his going to Iowa over night so long as he was always accessible in Nebraska during the day. When the plaintiff got ready to sue him, he was sued and served in Douglas county, Nebraska. It seems clear, therefore, that the days on which he was not in Omaha, and accessible to service are to be taken into account, not the number of hours during which he was in Iowa. Looking at it thus, if we allow two months of each year for vacations and holidays, which is far more than the testimony shows, and 52 Sundays a year, we would have four months and 104 days of absence in all, had he resided in Iowa the full term of two years. But he had resided there only one year and three months of the time that elapsed after accrual of the cause of action till the expiration of the five year limitation. It is obvious, therefore, that the period of absence thus computed is the

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extreme that could be made out from the evidence. At the time he changed his residence to Iowa, three years and nine months of the statutory period had elapsed. Three years and three months more elapsed till suit was brought. Of that time, if we take the most liberal view of the evidence possible, reckoning the days on which he was not in Omaha throughout business hours and liable to service of process, the extreme aggregate of defendant's absences was only four months of vacations and holidays and 104 Sundays. ' This aggregate, added to the year and three months the statute had yet to run, obviously brings the bar of the statute well inside the date of the commencement of this action.

We therefore recommend that the judgment be reversed and the cause remanded.

SEDGWICK and OLDHAM, CC., concur.

REVERSED AND REMANDED.

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WILLIAM DEERING & COMPANY V. H. P. WALTER ET AL.

FILED JANUARY 8, 1902. No. 10,895.

Commissioner's opinion. Department No. 3.

**Bills and Notes: STIPULATION WAIVING DAMAGES: CONSIDERATION.**  
If a note which is given in settlement of a past due indebtedness, and which extends the time of payment, contains a stipulation releasing and discharging all claims for damages arising out of the transaction in which the indebtedness was incurred, the stipulation rests upon a sufficient consideration and will be upheld.

ERROR from the district court for Butler county. Tried below before SEDGWICK, J. *Reversed.*

*O. P. Davis and Robert Ryan, for plaintiff in error.*

*Steel Bros. and Hastings & Hall, contra.*



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AMES, C.

This cause was submitted without oral argument upon the brief of the plaintiff in error alone. For the purposes of this opinion the state of the record is taken to be such as it is represented to be by the brief. It is a fair presumption that if there was any important misrepresentation of fact in the brief, the defendants in error would have taken pains to point it out.

In 1891 the defendants purchased of the plaintiff at Rising City, Neb., a Deering harvester and binder, giving in payment therefor their three certain promissory notes, dated August 3, 1891, payable as follows, viz.: one for \$35, due Jan. 1, 1892; one for \$50, due Jan. 1, 1893; one for \$55, due Jan. 1, 1894. The first and second maturing notes were paid shortly after maturity thereof. On or about Jan. 1, 1894, the time of payment of the third note above referred to was extended by the following instrument:

"\$61.60.

January 1, 1894.

On or before the 1st day of Apr., 1894, for value received, I, the undersigned, as principal, of Reading township, county of Butler, and state of Nebraska, promise to pay to William Deering & Co. (an incorporated company under the laws of the state of Illinois), or order, sixty-one and 60-100 dollars, payable at the Rising City Bank, in Rising City, Nebraska, with interest at the rate of ten per cent. per annum, payable annually, from the date hereof until paid. And in consideration of the renewal and extension of my note, No. 128042, heretofore held by said company, I hereby acknowledge full satisfaction of and unconditionally release and relinquish all claim or claims against the said William Deering & Co., arising out of the purchase from said company of the certain machine for which the note (or notes), of which this is a renewal, was given.

H. P. WALTER.

"J. L. WALTER."

The action is upon this note. It is alleged in the an-



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swer, and evidence was admitted on the trial, that at the time of the sale of the machine in 1891, the plaintiff had given a written warranty of it, in certain particulars, of which warranty there had been a breach resulting in damages to the defendant. It is also alleged that at the time of the giving of the note in suit, the plaintiff agreed orally to put the machine in repair so that it would do good work in the season of 1894, but had neglected and refused so to do. There was no competent evidence of the alleged parol agreement because it is not shown that one Harrison, who was a mere collector for the plaintiff, and who is claimed to have made it for and on behalf of the plaintiff, as its agent, had any authority for so doing. Under this state of the pleadings and evidence, any inquiry concerning the alleged warranty and a breach of it and resulting damages, was clearly immaterial and irrelevant. The note sued upon is not alleged to have been obtained by any unfair means and it expressly, and in the clearest language, and upon a sufficient consideration, to-wit, an extension of time for the payment of a part of the indebtedness, waives and releases all claims for damages arising out of the purchase of the machine. Due and seasonable exceptions to these errors were taken by the plaintiff both during the progress of the trial and by request for instructions, and the trial having resulted in a verdict and judgment for the defendant, the plaintiff brings the case here by proceedings in error for a reversal which is clearly its right.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

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WILLIAM DEERING & COMPANY V. H. P. WALTER ET AL.

FILED JULY 1, 1902. No. 10,895.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: SUBMISSION EX PARTE: STATEMENTS OF RECORD IN BRIEF.** Ordinarily when a cause is submitted without oral argument and upon the brief of the plaintiff in error alone, the statements of the brief as to the contents of the record will be treated as true and accurate.
2. **Appeal and Error: INSTRUCTION WITHOUT PREJUDICE.** A party can not be heard to complain of error in an instruction from which he suffered no prejudice.
3. **Appeal and Error: CONFLICTING EVIDENCE: CONCLUSIONS OF FACT.** Conclusions of fact drawn by a jury from conflicting evidence will not be disturbed.

REHEARING of case reported *ante*, page 361.

ERROR from the district court for Butler county. Tried below before SEDGWICK, J. *Judgment below affirmed.*

*O. P. Davis*, for plaintiff in error.

*Hastings & Hall* and *S. H. Steele*, *contra.*

AMES, C.

This action was submitted without brief or oral argument on behalf of the defendant in error, and decided by an opinion filed on the 8th day of January of this year. Afterwards a motion for a rehearing was granted and the case has been again submitted upon briefs by both parties. The negligence of counsel for the defendant in error, at the former hearing, is without valid excuse, and to it is due whatever of oversight was committed by the court. It is not an unreasonable rule, that statements by reputable counsel in printed briefs, as to the issues and facts disclosed by the records in a case before the court, will be taken as accurate unless they are challenged by their adversaries. This proposition derives es-

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pecial force from the fact that attorneys are advocates, and however honorable and upright, are by the very nature of their occupation inclined to a biased and prejudiced view, in favor of their clients, of matters which they are engaged in litigating, so that opposing counsel, who are not lightly to be accused of negligence, must be supposed to have carefully examined such statements and to have corrected whatever in them they have found to be amiss. This is the especial service which attorneys are hired to do. The recital of facts contained in the former opinion needs to be supplemented and corrected by saying that, as it now appears, the fact of the making of the alleged oral agreement by the agent Harrison and the question of his authority to make it, instead of being as we formerly supposed unsupported by competent evidence, were the subject of sharp conflict in the testimony presented upon the trial, and the issue thereon having been fairly submitted to the jury, their verdict thereon in favor of the defendant in error is obligatory upon this court. This agreement which is alleged, and also found by the jury to have been the principal, if not the only, consideration for which the note was given, was to the effect that the plaintiff should put the harvester in such condition and repair that it should do good work during the season of 1894, and that if it should fail so to do the note should not be payable. The making of that agreement was an admission that the machine was then out of repair. The note itself acknowledged that the maker had some claim or claims against the payee, growing out of the purchase of the machine which was expressly released, relinquished and satisfied in consideration of the extension of the time of payment effected by the transaction. Such being the case we do not think it material to inquire what those claims were, or how they arose, or whether the inefficient condition of the machine calling for repairs constituted a breach of a previous warranty. All these matters were set at rest by the note itself together with the parol agreement. The remaining question in the case is, whether the

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agreement to make repairs was performed by the plaintiff. This too was an inquiry of fact submitted to the jury upon conflicting evidence and conclusively answered by their verdict. The plaintiff in error complains that certain instructions given to the jury were erroneous in incorrectly stating the measure of damages upon a breach of warranty. If so, the error was without prejudice to the plaintiff. If the jury found the parol agreement was made as alleged, no question of damages could properly arise in an action upon the note under the issue as joined. The agreement and its breach merely canceled the note and defeated a recovery. The defendant could not in that action, recover or recoup damages for breach of a prior, superseded, canceled and satisfied contract, and the plaintiff could rightfully have recovered nothing more nor less than the face of his note and interest. This view of the matter was evidently taken by the jury.

It is recommended that the former decision of this court be vacated and set aside and the judgment of the district court affirmed.

ALBERT and DUFFIE, CC., concur.

The former decision of this court is vacated and set aside and the judgment of the district court affirmed.

JUDGMENT BELOW AFFIRMED.

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WILLIAM H. CARNAHAN, APPELLANT, v. CHARLES M. BREWSTER ET AL, IMPEADED WITH JOHN L. MEANS, APPELLEE

FILED JANUARY 8, 1902. No. 10,916.

Commissioner's opinion. Department No. 2.

1. **Estoppel: PLEADING.** When an estoppel is relied on it must be pleaded.
2. **Appeal and Error: ISSUES IN APPELLATE COURT.** It is a well defined rule of this court that under all ordinary circumstances parties will be restricted in the appellate court to the same issues on which they relied in the court of original jurisdiction.

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3. **Default: EFFECT AS TO PLEADING.** A default, by a party properly served, is a confession only of such facts as are properly pleaded in the petition.
4. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT: WHEN RENDERED.** Under section 847 of the Code of Civil Procedure, as it existed before its repeal, a deficiency judgment could not be rendered until the mortgaged property had been exhausted by sale and confirmation thereof.

APPEAL from the district court for Howard county.  
Tried below before THOMPSON, J. *Affirmed.*

*Tibbets Bros. & Morey*, for appellant.

*W. H. Thompson*, contra.

OLDHAM, C.

This suit had its origin in an action instituted by the plaintiff against a number of defendants in the district court for Howard county, Nebraska, for the foreclosure of a real estate mortgage. The action was begun in January, 1890. The only question involved in the original suit which is now before us for consideration arises on the allegation contained in the ninth paragraph of plaintiff's original petition. This paragraph is as follows: "Defendant, John L. Means, claims the title to the said premises by virtue of a purchase of the same at a judicial sale; and said John L. Means assumed and agreed with the plaintiff, to pay plaintiff's said mortgage, by due and solemn promise in writing, and Means, wife of John L. Means has no interest except such as arises from such marriage relation." On the 28th day of September, 1891, defendant, John L. Means, being in default for an answer, the court entered a decree in favor of the plaintiff for the amount due on the mortgage against John L. Means, and others, and ordered the mortgaged property sold. On the same day an entry was made permitting the defendant, Means, and others, to file answers on their liability for deficiency. On the 29th day of September, 1891, defendant, Means, filed his answer to the allegation

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contained in the ninth paragraph of plaintiff's petition and denied any consideration for the promise in writing alleged on in plaintiff's petition. After the filing of this answer the cause of action between plaintiff and defendant, Means, appears to have been continued either by agreement or on application of one or the other of the contending parties until the 14th day of November, 1898, at which time the plaintiff filed a reply in the nature of a general denial to the answer of defendant, Means. After the filing of this reply the cause was again continued on the application of the plaintiff for the purpose of procuring further testimony and on the ninth day of March, 1899, a trial was had to the court and judgment was entered for the defendant and plaintiff appeals.

The first contention that plaintiff urges for a reversal of the judgment of the trial court is that the decree of foreclosure entered on the 28th day of September, 1891, estops the defendant from setting up any defense existing at the time the decree was rendered and that the order of the court permitting him to answer would only avail him for the purpose of interposing subsequent defenses and not for the purpose of tendering any issue that could have been determined at the time of the decree. Even if we were inclined to follow this technical construction of the effect of the decree and leave to answer granted by the court on the same day we could not then see our way clear to give plaintiff the benefit of such construction in view of the fact that seven years after the decree had been rendered he filed a reply to defendant's answer and neglected to interpose his plea of estoppel. It is now so well settled as to be elementary, that when a party relies on an estoppel he must plead it, and it is useless to cite authorities on this question.

There is another cogent reason why plaintiff should not now be heard on his plea of estoppel and that is because of his failure to interpose this plea in the court below. It is a well defined rule of this court that under all ordinary circumstances parties will be restricted in

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the appellate court to the same issues on which they relied in the court of original jurisdiction. *Smith v. Spaulding*, 40 Neb., 339; *Omaha Brewing Association v. Wuethrich*, 47 Neb., 920; *Moline, Milburn & Stoddard Co. v. Wood Mowing & Reaping Machine Co.*, 49 Neb., at page 879.

There is another good reason why the decree of September 28, 1891, should not have estopped the defendant from denying personal liability, even if such estoppel had been pleaded, and that is that the allegations of the ninth paragraph of plaintiff's petition failed to allege any consideration for the alleged promise of defendant, Means, to pay plaintiff's debt and therefore did not state a good cause of action for a deficiency judgment against him. *Green v. Hall*, 45 Neb., 89, 63 N. W. Rep., 119.

While defendant, Means, had been served with proper process and was in default at the time the decree of September 28, 1891, was entered against him, yet a default by a party to a suit who has been properly served is a confession of only such facts as are properly pleaded. *Lincoln National Bank v. Virgin*, 36 Neb., 735, 55 N. W. Rep., 218.

The evidence offered in the court below appears to fully sustain the conclusions reached by the learned trial judge. It appears from the testimony that defendant, Means, claimed some interest in the mortgaged premises by reason of a mortgage subsequent to that of plaintiff and that Means was foreclosing his mortgage before this suit was instituted and that he sent the following letter to McKinley & Lanning, agents for the plaintiff, on the 6th day of September, 1889:

"GRAND ISLAND, NEB., September 6, 1889.

"*Mess. McKinley & Lanning, Hastings, Neb.*

"GENTS: Yours of the 4th came during my absence from home. In reply would say regarding the Brewster loan in Howard county will say that I am negotiating a sale of this property and hope to close the deal very soon. This is to be a cash sale, and if I succeed, I will pay up the

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mortgage in full. Should I not succeed in making this sale will pay you the amount of interest due.

"Very respectfully, JOHN L. MEANS."

It is on the promise contained in this letter to pay the interest that plaintiff relies. Defendant testifies that he received no consideration whatever for this promise and this proposition is not specifically denied by the testimony of plaintiff's witnesses, nor is there any allegation of consideration in plaintiff's petition, as we have already pointed out. There is no evidence that plaintiff ever agreed to extend the time of payment of this mortgage or to forbear for any specified time the beginning of an action for the foreclosure of his lien in consideration of this promise by the defendant to pay the interest. We are therefore of the opinion that the promise, although in writing, was a mere *nudum pactum* and will not support an action against the defendant. In *State v. Holcomb*, 46 Neb., at page 615, 65 N. W. Rep., at page 874, it is said by this court: "Reciprocal promises as the basis of a valid agreement, must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum*."

There is still another reason why the judgment of the trial court should be affirmed and that is that there is nothing in the record that shows the coming in of the report and the confirmation of the sale before the action for the alleged deficiency was sought to be enforced against the defendant. Under section 847 of the Code of Civil Procedure which was in force in 1891, a deficiency judgment could only be rendered after the mortgaged property had been exhausted and no personal judgment could be entered until after the coming in of the report of the sale and the confirmation thereof. *Clapp v. Maxwell*, 13 Neb., 542.

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK, C., concurs in the conclusion reached.

**AFFIRMED.**



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POUND, C., concurring.

I concur in the recommendation of my brother OLDHAM for the reason that the record fails to show confirmation of the sale at which the deficiency accrued. As to the applicability of *Lincoln National Bank v. Virgin*, 36 Neb., 735, to this cause, I prefer to express no opinion.

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DENNIS SULLIVAN V. ALONZO HAIGHT.

FILED JANUARY 8, 1902. No. 10,954.

Commissioner's opinion. Department No. 2.

**Forcible Entry and Detainer: APPEAL AND ERROR.** No appeal lay to the district court from the judgment of a justice of the peace in proceedings in forcible entry and detainer prior to the enactment of chapter 85, Laws of 1901.

ERROR from the district court for Platte county. Tried below before HOLLENBECK, J. *Reversed with directions.*

*McAllister & Cornelius*, for plaintiff in error.

*Reeder & Albert*, contra.

OLDHAM, C.

This was an action in forcible entry and detainer prosecuted by the defendant in error against the plaintiff in error before a justice of the peace of Platte county, Nebraska. There was a judgment for the defendant in error before the justice and plaintiff in error attempted to have this judgment reviewed on appeal in the district court for Platte county. The district court attempted to entertain the appeal and trial was had *de novo* there and defendant in error again recovered judgment. This judgment plaintiff in error seeks to have reviewed in this court.

This case presents the same question as that presented in *Armstrong v. Mayer*, 60 Neb., 423. Under the rule then established the district court obtained no jurisdiction

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of the subject-matter of the case by the attempted appeal, hence all the proceedings had in that court were a mere nullity and the judgment must therefore be reversed; but as the attempted appeal was taken and the subsequent proceedings in the district court were had at the instance of plaintiff in error, we think the costs should be taxed to plaintiff in error.

We recommend accordingly that the judgment be reversed and the district court directed to dismiss the pretended appeal, and that the costs be taxed to plaintiff in error.

SEDGWICK and POUND, CC., concur.

The judgment is reversed and the district court is directed to dismiss the pretended appeal.

REVERSED WITH DIRECTIONS.

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GEORGE W. MARSH ET AL. V. STATE OF NEBRASKA, EX REL.  
HANNAH NORTH, ET AL.

FILED JANUARY 8, 1902. No. 12,091.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: MOTION FOR NEW TRIAL.** This court will not review the proceedings of the district court by petition in error unless a motion for a new trial was made in the trial court, and a ruling obtained thereon. *Jones v. Hayes*, 36 Neb., 526, 54 N. W. Rep., 858, followed.
2. **Pleading: CONSTRUCTION AFTER JUDGMENT.** When a petition is not assailed until after judgment, it will be liberally construed so as to be sustained, if possible.
3. **Mandamus: WHEN WILL LIE.** Mandamus will lie to control the action of the State Printing Board in awarding contracts for state printing to the lowest and best bidder.

ERROR from the district court for Lancaster county.  
Tried below before CORNISH, J. *Affirmed.*

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*F. N. Prout, Attorney General, and Lambertson & Hall,*  
for plaintiffs in error.

*Wilson & Brown, contra.*

OLDHAM, C.

On the 23d day of February, 1901, the relator, Jacob North & Company, filed in the district court of Lancaster county, Nebraska, an application in the form of a motion and affidavit for a writ of mandamus commanding the respondents, who constitute the state printing board, to award to the relator the contract for printing one thousand copies each of volumes 63 and 65 of the supreme court reports of the state of Nebraska for the sum of ninety-eight cents per page for each of said volumes. The reason assigned for said writ in the motion and affidavit of the relator is that Jacob North & Company were the lowest and best bidders on said volumes 63 and 65. An answer was filed on the part of the respondents in which it was alleged in substance that the relator, Jacob North & Company, did not bid in accordance with the requirements of law or in accordance with the requirements of the advertisement for said work, and that they were not the lowest and best bidders, but on the contrary the State Journal Company were the lowest and best bidders on volumes 61 to 68 inclusive of the Nebraska supreme court reports. The answer then sets out the bid of the State Journal Company and the fact that a good and sufficient bond accompanied the bid. On issues thus joined the trial was had in the district court and the relator was awarded peremptory writ of mandamus as prayed for in its motion and affidavit.

The record shows that this trial was had at the February term of the district court for Lancaster county on the 4th day of April, 1901. The record also shows that the February term of this court was adjourned without day on the 5th day of April, 1901, and that a motion for a new trial was filed by the respondents on the 6th day of April,

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1901, and that this motion has never been disposed of by the trial court. Under this condition of the record it is a very serious question whether, under the rules governing proceedings in this court, we would be permitted to examine any of the allegations in the petition in error which respondents have filed here.

In *Smith v. Spaulding*, 34 Neb., 128, 51 N. W. Rep., 469, a petition in error was dismissed from any consideration in this court because no ruling had been obtained on a motion for a new trial filed in the court below by the plaintiff in error. POST, J., in disposing of the case said: "Plaintiff in error should have called the attention of the district court to the rulings he complained of. If such rulings were erroneous, we must presume that the district court would have allowed a new trial. This rule is so well settled in this court as to render the citing of authorities unnecessary." This rule was adhered to in the later case of *Jones v. Hayes*, 36 Neb., 526, 54 N. W. Rep., 858. In this case NORVAL, J., rendered the opinion.

The record in the case at bar is slightly distinguishable from the records in the cases just cited in that the motion for a new trial in this case was not filed until after the adjournment of the term of court at which the judgment was rendered and consequently the trial judge would have no authority to have acted on the motion in any way except to have either stricken it from the files or to have overruled it. *Dookittle v. American National Bank*, 58 Neb., 454, 78 N. W. Rep., 926; *Nelson v. Farmland Security Co.*, 58 Neb., 604, 79 N. W. Rep., 161. If we should treat this case as one in which no motion for a new trial was filed in the court below and should apply to it the rule announced in *Farris v. State*, 46 Neb., 857, 65 N. W. Rep., 890, we could then only examine the sufficiency of the pleadings to sustain the judgment, and the pleadings not having been assailed until after judgment would be liberally construed so as to be sustained if possible. *Dodds v. McCormick Harvesting Machine Co.*, 62 Neb., 759, 87 N. W. Rep., 911.

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The affidavit, which takes the place of a petition in this case, alleges in substance that the respondents constitute the state printing board of the state of Nebraska; that they had received estimates from the offices of each department of the state for printing according to law; that these estimates included those of the clerk of the supreme court of the state of Nebraska for eight volumes of the reports of the supreme court, including the volumes bid for by the relator; the affidavit sets out the advertising for bids, as provided for by law, and that the relator was the lowest and best bidder for volumes 63 and 65 of said reports, their bid being 98 cents per page on each of these volumes; it also alleges that notwithstanding such fact the respondents failed and refused to award them the contract, and that the respondents awarded the contract for the printing of the said volumes of supreme court reports to the State Journal Company at the rate of \$1.15 per page. They also allege that their bid was in accordance with the schedule and specifications furnished by the said respondents and was accompanied by a sufficient bond which was approved by the respondents.

It is urged by counsel for the respondents that mandamus will not lie in this case because relator's affidavit shows that the contract for the printing had already been awarded to the State Journal Company before this action was commenced. But this position is in conflict with the doctrine announced by this court in the case of *State v. Cornell*, 52 Neb., 25, 71 N. W. Rep., 961. In that case parts of the contract for printing had been let to two other bidders before the application for mandamus was instituted, but notwithstanding this fact, under the law then existing the writ was awarded against the board commanding it to approve relator's bid and award it the entire contract. This case also established the principle that mandamus will lie to control the action of the state printing board in the awarding of its contracts for state printing to the lowest and best bidder. The law under which the decision was rendered in the case of *State v.*

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*Cornell, supra*, was changed in 1897 by the adoption of section 2, chapter 68, Compiled Statutes, which provides that "Each article or piece of work shall be bid on separately and the contract awarded in like manner to the lowest and best bidder." It seems to us that applying a liberal rule of construction to this pleading it is sufficient to sustain the general finding of the district court awarding the peremptory writ prayed for.

We are therefore of the opinion that in any view we may take of the record presented to us in this cause the judgment of the lower court should be affirmed, and we so recommend.

SEDGWICK and POUND, CC., concur.

AFFIRMED.

POUND, C., concurring.

I concur in the recommendation of my brother OLDHAM. The position taken by counsel for respondents at the argument was that the allegations of their answer stood admitted and hence this court was to consider whether the affidavit and answer, taken together, sustain the judgment, which it might do, if such were the case, without a motion for a new trial. This position is not well taken in view of section 653, Code of Civil Procedure, which provides that the alternative writ or affidavit and the answer shall be the sole pleadings in mandamus. No reply was required. In the absence of a motion for a new trial, we cannot review a judgment awarding a writ of mandamus further than to see that it is sustained by the relator's pleading. The facts set up in respondents' answer may have been admitted, but as the record stands we cannot so take it.

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**EUNICE BALDWIN, APPELLANT, v. WELLINGTON R. BURT  
ET AL., IMPLEADED WITH MARION G. ROHRBOUGH, AP-  
PELLEES.**

FILED JANUARY 8, 1902. No. 12,163.

Commissioner's opinion. Department No. 2.

1. **Judgment: APPEAL AND ERROR: LAW OF THE CASE: DIVIDED COURT.** The rule that a prior decision of this court in a given cause is the law of the case in all subsequent proceedings as to matters passed upon or involved in the decision, does not apply to propositions of law upon which the members of the court taking part therein were equally divided.
2. **Process: FALSE RETURN: PROOF: VALIDITY OF JUDGMENT.** It is the settled law of this state that a false return of service of process may be impeached by extrinsic evidence and that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void and open to collateral attack.
3. **Vacation of Judgments: APPLICATION OF STATUTE.** The third subdivision of section 602, Code of Civil Procedure, applies only to voidable judgments which are proof against collateral attack and not to such as are absolutely void.
4. **Enforcing Void Judgment: RESISTANCE WITHOUT MERITORIOUS DEFENSE.** Where the plaintiff is seeking affirmatively to enforce a void judgment, one who merely resists is not governed by the rule requiring a party seeking relief against such a judgment to show a meritorious defense.
5. **Appeal and Error: REFUSAL OF COURT TO PERFORM NUGATORY ACT.** A judgment should be reversed only for errors which operate to the prejudice of the party complaining thereof. Hence the refusal of a court to perform an act which is purely nugatory and without legal force or validity ought not to be reviewed by this court, however informal or irregular the proceeding by which such refusal is expressed.

APPEAL from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*Gaines, Kelby & Storey*, for appellant.

*Byron G. Burbank*, contra.

POUND, C.

This cause, already twice before in this court, comes here once more upon appeal from an order of the district

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court sustaining certain objections of the defendant, Marion G. Rohrbough, to its jurisdiction over him or his property. The facts disclosed by the record, briefly stated, are these: suit was begun by appellant to foreclose a mortgage upon several tracts of land, including certain property of Rohrbough, the appellee herein. The sheriff returned that he had served summons upon said Marion G. Rohrbough by delivering to "her personally" a true copy thereof. Thereupon default was entered in due course and a decree of foreclosure was rendered, which was brought to this court on appeal by other defendants. *Baldwin v. Burt*, 43 Neb., 245. That decree having been reversed, a new one was rendered and an order of sale issued. When the appraisers came upon his property under the order of sale, Mr. Rohrbough, who claims to have known nothing of the proceedings or decree prior to that time and had made no appearance, filed objections to the jurisdiction of the court, upon consideration whereof the court quashed the return of service. The sale proceeded, however, and on motion for confirmation and objections thereto by Mr. Rohrbough, the court set it aside. An appeal was taken from those orders by the plaintiff, which resulted in a reversal of the order quashing service and an affirmance of the order refusing confirmation of the sale. *Baldwin v. Burt*, 54 Neb., 287. On coming down of the mandate, the plaintiff procured a new order of sale, and was proceeding thereunder when further objections to the jurisdiction of the court, supported by affidavits showing the facts above indicated, were filed by Mr. Rohrbough. No relief was asked for, but the court proceeded to a hearing on the objections, in the course of which it clearly and conclusively appeared that service was had, not upon Marion G. Rohrbough, a man, the owner of the property in controversy, but on one Lillian Rohrbough, the wife of Lee J. Rohrbough, brother of the party returned as served. The officer who made the service testified that he intended to and did serve the writ upon a woman, and the very words of his return indicate as much. It also ap-



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peared clearly that the writ never reached or came into the hands of Marion G. Rohrbough. The court made findings accordingly and sustained the objections.

Each party now invokes the well settled rule that a prior decision of this court in a given cause is the law of the case in all subsequent proceedings as to all matters passed upon or involved in the decision. The appellant relies upon the reversal of the order quashing service and what are claimed to be necessary deductions therefrom. The appellee relies upon the affirmance of the order denying confirmation of sale and the grounds thereof as stated in the syllabus and in the opinion of RYAN, C. But we do not think the rule should apply to propositions of law upon which the members of the court taking part in the decision were equally divided. The two judges and two commissioners who participated were agreed that the one order should be reversed and the other affirmed, but they differed as to the reasons therefor and as to the principles of law to be applied. The appellant relies upon the opinion of RAGAN, C., which would seem to sustain her position. The appellee argues from the opinion of RYAN, C., and the syllabus, which in large part sustain his position. HARRISON, C. J., concurred with RYAN, C., holding the refusal to confirm the sale proper because the court never had any jurisdiction over Mr. Rohrbough, and holding the order quashing service erroneous because the summons was *functus officio* after decree and the return mere evidence, so that the decree itself, not the summons and return, had become the real and only legitimate subject of attack. RAGAN, C., held that the order refusing confirmation was proper because the service had been quashed at the time the sale was made and hence the authority to make a sale was gone, and that the order quashing service was erroneous because the real point of attack being the decree, a defense ought to have been stated as required by section 602, Code of Civil Procedure. SULLIVAN, J., was unable to agree in all that was said in either of the other opinions. He concurred with RAGAN, C., as to the reasons

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for upholding the order denying confirmation. On the other point he simply said the order quashing service was in legal effect a vacation of the decree accomplished in an unauthorized manner. NORVAL, J., expressed no opinion and IRVINE, C., did not sit. Under such circumstances it cannot be said that the syllabus is to be taken as expressing the law of the case, or that any rules to be given that effect were laid down. The several propositions of law discussed are left open, and it is now our duty to examine them independently and state our independent conclusion.

It is the settled law of this state that a false return of service of process may be impeached by extrinsic evidence and that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void and open to collateral attack. *Campbell Printing Press & Manufacturing Co. v. Marder*, 50 Neb., 283; *Holliday v. Brown*, 33 Neb., 657; *Hayrs v. Nason*, 54 Neb., 143. Counsel have cited us to a decision of the supreme court of Illinois to the contrary, and we are aware that many courts of high standing hold otherwise as to the last proposition. Van Fleet, *Collateral Attack on Judicial Proceedings*, section 468. But we are entirely satisfied of the soundness of the established rule in this state. To say that a party not served in fact is bound in any way by a recital of service which derives its force solely from the power of the court which is acquired by service, is to reason in a circle. Van Fleet says that the fallacy in the doctrine adhered to in this state lies in "confusing *law* with *right*." Where we are not bound by the imperative terms of a statute or some like emanation from superior authority, or the rule is not of such long standing and unquestioned validity that controlling considerations of expediency require adherence to it, judicial confusion of right and law is far from being noxious. So long as judges are compelled by the form and nature of our legal system to undertake some portion of the work theoretically devolving upon the legislator, the same

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ethical considerations ought to be kept in view as those moving any other lawgiver.

If a judgment based upon a false return of service, no service having in fact reached the party to be bound in any way, is entirely void and open to attack in collateral proceedings, it must follow that the third subdivision of section 602, Code of Civil Procedure, does not apply thereto. It is true in his opinion in this case on the former appeal (54 Neb., at page 293), RAGAN, C., stated *arguendo* that the failure to serve process upon Rohrbough and service upon his sister-in-law instead was an irregularity within the purview of that section. But when the question came up once more in *Clark v. Charles*, 55 Neb., 202, 206, the court expressly refrained from deciding as to the application of the statutory provisions for vacating and modifying judgments to those which are void and subject to collateral attack. Later in *Kaufmann v. Drexel*, 56 Neb., 229, it was squarely passed upon, and the court held that section 602 has reference only to judgments and orders possessing some degree of legal vitality, and not to such as are absolutely void. "To speak of the vacation or modification of a void judgment," says SULLIVAN, J., in that case, "is a perversion of language. There being no judgment, but the mere form and counterfeit of a judgment, there is nothing to annul." We may take it as settled, therefore, that the "irregularities" referred to in the third subdivision of that section are those which render the judgment voidable only, leaving it proof against collateral attack, such as fixing answer day too early in service by publication (*Wilkins v. Wilkins*, 26 Neb., 235; *Scarborough v. Myrick*, 47 Neb., 794), or service of summons by reading instead of delivering a copy (*Gandy v. Jolly*, 35 Neb., 711). Even where there is no service at all and the judgment is void it is, of course, true that when one proceeds affirmatively to have it set aside he must show a meritorious defense. But this principle has no application to cases of mere resistance. When the plaintiff is seeking to enforce the judgment affirmatively, it is enough to show that it

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is void. The plaintiff's rights depend upon it, and if it fails, the rights asserted under it fail likewise. *Campbell Printing Press & Manufacturing Co. v. Marder*, 50 Neb., 283.

In view of these well established rules, we think the order of the district court affords no ground of complaint. In its effect and operation, it is simply a refusal on the part of the court to do an act which would be purely nugatory and without legal force or validity. Had another sale been held under the decree and a deed issued, when the purchaser brought ejectment thereunder his deed would have failed by reason of the want of jurisdiction. The judgment being worthless, all proceedings founded upon it are equally worthless. "All acts performed under it and all claims flowing out of it are void." 1 Freeman, Judgments [4th ed.], section 117. But it is well settled that a judgment should be reversed only for errors which operate to the prejudice of the party complaining thereof. Where it is manifest that no prejudice has resulted, errors, of themselves, are not ground of reversal merely to vindicate abstract principles of the law. Hence it should not matter whether the court refused to proceed under the void judgment on its own motion or because its attention was called to the facts by the objections filed by appellee. His objections merely set forth the facts. There is no prayer for relief. But whether we treat them as a mere suggestion to the court that it ought not to go on, or as a covert attack on the decree, is immaterial. Appellant has not been prejudiced. He has no right to insist that the court proceed with a mere farce. Even if the mode by which the court expressed its refusal to go on had been informal or irregular, it ought not to be reviewed under such circumstances.

We recommend that the order appealed from be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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EUNICE BALDWIN, APPELLANT, v. WELLINGTON R. BURT ET AL., IMPLEADED WITH MARION G. ROHRBOUGH, APPELLEES.

FILED OCTOBER 22, 1902. No. 12,163.

Commissioner's opinion. Department No. 2.

1. **Judgment: VOID OR VOIDABLE: APPLICATION OF STATUTES.** The provisions of section 602, Code of Civil Procedure, apply to voidable and not to void judgments.
2. **Judgment: IMPEACHING VALIDITY BY AFFIDAVITS: NO OBJECTION BELOW: APPEAL.** Where evidence of facts tending to impeach the validity of a judgment is presented to the trial court by affidavits, and no objection is made in the court below to the consideration of the affidavits because the judgment creditor has not had an opportunity to cross-examine witnesses, it is too late to interpose this objection after the case has been removed to this court upon appeal.

REHEARING of case reported *ante*, page 377.

APPEAL from the district court for Douglas county. Tried below before KEYSOR, J. *Judgment below re-affirmed.*

*Gaines, Kelby & Storey*, for appellant.

*Byron G. Burbank*, contra.

OLDHAM, C.

The former opinion in this case was filed January 8, 1902, and is reported *ante*, page 377. In that opinion all the issues involved in this controversy are fully stated and each question raised is carefully reviewed, and we think properly determined. It unmistakably appears that this proceeding is grounded on an attempt to force a judicial sale of real estate owned by appellee, Rohrbough, on a judgment absolutely void as to him and his property, for the reason that no service of summons of any kind was ever had upon him. Appellant still contends that appellee, Rohrbough, should not have been heard to question the validity of the judgment on an objection filed to the confirmation of the sale made under it; but that his rights,

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if any, should have been enforced under the provisions of section 602 of the Code of Civil Procedure. We still think that there is no escape from the conclusion reached in the former opinion that in view of the rule plainly laid down in the recent case of *Kaufmann v. Drexel*, 56 Neb., at page 233, the provisions of section 602, *supra*, are construed to relate to orders and judgments that are voidable and not to those that are void.

In the brief on rehearing appellant says that they "wish also to protest against the adoption of a rule by this court that allows a judgment to be nullified without a trial as to its validity and a chance to cross-examine the witnesses offered by the judgment defendant in support of his claim that the judgment is invalid." We have no criticism to offer on this reasonable protest, except that it is not made at an opportune time. It is true that the record discloses the fact that proof that no service of summons was ever made on appellee, Rohrbough, was procured by the affidavit of the officer who had the summons in his hands for service. No objection to this method of proof was interposed in the court below and no request was made for the privilege of cross-examining the officer, and appellant did not dispute the fact that no service of summons had ever been had upon Rohrbough, but simply denied his right to raise this question on an objection to the confirmation of the sale had under the judgment. So there is nothing in the former opinion that threatens to debar a judgment creditor from the right of cross-examining witnesses on whose testimony a judgment is sought to be impeached if such privilege be demanded at the proper time.

The former opinion proceeded on the theory that whenever it was made to unmistakably appear to a trial court that he was requested to stand at the pall of a void judgment—a lifeless thing—a dead Lazarus—and command it to arise and fling off the vestments of the grave, he might decline to attempt the miracle even if objection to the proposed incantation was but informally interposed.

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It is therefore recommended that the former opinion in this case be adhered to.

BARNES and POUND, CC., concur.

JUDGMENT BELOW REAFFIRMED.

POUND, C., concurring.

The only serious question in this cause is whether the court should have received proof by affidavit or left the matter to be tried in ejectment or suit to quiet title. I thought at the former hearing, and still think, that if the decree was in fact void as to Rohrbough, so that a sale thereunder would convey no title, the ruling of the district court in refusing to confirm such a sale would be error without prejudice, no matter how the court ascertained the invalidity of the prior proceedings. A sale and deed can do the appellant no possible good so long as she can never get possession under them; and the court should not be ordered to do a nugatory act. The point, therefore, on which all must turn, is whether there was service on Rohrbough. If this were in serious dispute, I should hold that the question could not be tried by affidavit. *Fox v. State*, 63 Neb., 185, 88 N. W. Rep., 176. But so long as the sheriff's return strongly suggests, and his affidavit shows, that service was not made, and there is no substantial conflict, there can be no objection to the action of the court in proceeding upon affidavit.

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STATE OF NEBRASKA, EX REL. SAMUEL THOMPSON, RELATOR,  
V. DISTRICT COURT FOR JOHNSON COUNTY ET AL., RE-  
SPONDENTS.

FILED JANUARY 8, 1902. No. 12,410.

Commissioner's opinion. Department No. 1.

1. **Mandamus: AUTHORITY OF LOWER COURT UPON REVERSAL OF DECREE.**

Where upon appeal to this court the judgment of the trial court is reversed, and the cause remanded for further proceedings, the



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trial court has authority to take such further action in the interest of justice as the law will sanction and a sound discretion dictate or approve.

2. **Mandamus: CONTROL OF DISCRETIONARY POWER.** This court will not, by mandamus, undertake to control the discretionary powers of another tribunal.

Original application for a peremptory writ of mandamus to compel respondents to render judgment for relator in an action to foreclose a real estate mortgage. *Writ denied.*

*Samuel P. Davidson*, for relator.

*Geo. A. Adams*, contra.

KIRKPATRICK, C.

This is an application for a peremptory writ of mandamus on behalf of Samuel Thompson, relator, against the Honorable J. S. Stull, and the Honorable Charles B. Letton, judges of the district court for Johnson county. It is disclosed by the record that on the 19th day of May, 1898, a judgment and decree were entered in the district court for Johnson county against relator and in favor of John C. Buehler, dismissing the petition of plaintiff, which asked the foreclosure of a real estate mortgage. An appeal was regularly prosecuted by plaintiff in that action, relator herein, to this court, which, on the 10th day of July, 1901, resulted in a judgment of reversal and an order remanding the cause to the district court for further proceedings. Relator contends that inasmuch as the only answer filed in the trial court was a plea of payment, and that this court, in its judgment of reversal, found that such plea was not sustained by the evidence, therefore it is the duty of the district court to enter judgment immediately in favor of relator for the amount due upon the note and mortgage, together with a decree of foreclosure. The respondent, the Honorable J. S. Stull, refused to take this action, but set the case down for a new trial in its regular order on the docket.



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The order made by this court for the reversal of this case is as follows: "For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded." There can be no question that the effect of the language quoted, and of the judgment in that case, is a general reversal of the findings and judgment in the trial court, leaving the cause, except as to matters adjudicated in this court, in all respects as though no trial had ever been had. There is at the present time, neither in this court nor in the trial court, any finding of fact upon which a judgment could be properly entered. There can be no question that in this case the trial court is as fully empowered to proceed to a new trial and a final determination of the case, as though the case never had been brought to this court on appeal. The rule is well settled that in equity causes brought to this court on appeal, this court has jurisdiction, in a proper case, to enter judgment in this court; or remand the case with directions to the district court to enter judgment; or to reverse the findings and judgment of the trial court, and remand the cause generally for the trial court to take such steps as to it may seem just and proper. In the particular case under consideration, this court saw fit to reverse the findings and judgment of the trial court and remand the cause generally for a new trial. In the case of *Pinkham v. Pinkham*, 60 Neb., 600, this court, speaking by HOLCOMB, J., said: "Where, upon appeal to this court, the judgment of the trial court is reversed, and the case remanded for further proceedings, with directions to proceed according to law, *held*, that the case was remanded generally, and not specially or for any particular purpose." In that case the court further said: "Where, in an equitable action, a decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not

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inconsistent with the opinion of the appellate court, and a trial of the issues had *de novo*." To the same effect are the cases of *Troup v. Horbach*, 57 Neb., 644; *Badger Lumber Co. v. Holmes*, 55 Neb., 473. In the case of *Troup v. Horbach*, *supra*, this court, speaking by SULLIVAN, J., said: "Judgment was reversed, with authority to the trial court to take such further action, in the interests of justice, as the law would sanction and a sound discretion dictate or approve. Within the bounds of judicial discretion the court might grant, or refuse, leave to amend the pleadings. It might decide the case on the record already made. It might take additional evidence, or it might try all the issues *de novo*." From what has been said, and from the authorities quoted, it seems clear that the trial court may in its discretion take any action in said cause not inconsistent with the opinion of this court. The rule is elementary that this court will not, by mandamus, undertake to control the exercise of the discretionary powers of another tribunal. *State v. Merrell*, 43 Neb., 575; *State v. Churchill*, 37 Neb., 702; *State v. Slocum*, 34 Neb., 368.

For the reasons stated, it is recommended that the application for the writ be refused and the action dismissed.

HASTINGS and DAY, CC., concur.

The application for a peremptory writ is refused and the action dismissed.

WRIT DENIED.

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GEORGE DEWEY, APPELLANT, v. JAMES BRADFORD ET AL.,  
APPELLEES.

FILED JANUARY 22, 1902. No. 10,093.

Commissioner's opinion. Department No. 1.

1. **Principal and Agent: MORTGAGES: AUTHORITY TO COLLECT PRINCIPAL.**  
"The fact that a person, or company, is authorized to receive the installments of interest which become due on a mortgage, note or bond is not sufficient ground from which to infer that the au-

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thority also exists to collect or receive the principal sum, if the evidences of the indebtedness are not and have not been in the possession of such person or company." *Richards v. Waller*, 49 Neb., 639.

2. **Appeal and Error: EVIDENCE: AUTHORITY OF AGENT TO COLLECT: MORTGAGES.** Evidence examined, and found insufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Harlan county. Tried below before BEALL, J. *Reversed.*

*C. C. Flansburg*, for appellant.

*W. S. Morlan* and *J. G. Thompson*, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Harlan county by Edward Dewey against James Bradford and David Peoples and others, for the foreclosure of a mortgage executed by Bradford to Dewey. Peoples answered, setting up that he had purchased the land subject to the mortgage given by Bradford, and had paid the interest of the note and mortgage in full, and that the mortgage was a cloud upon his title, concluding with a prayer for a decree removing such cloud and quieting title in him. A reply was filed consisting of a general denial. Trial was had to the court which resulted in a judgment for Peoples, that the note and mortgage were paid, and that the cloud be removed. From this judgment Dewey appeals. During the pendency of this appeal, appellant died, and the suit has been revived in the name of George Dewey, who is the assignee of Susan G. Dewey.

The following facts are disclosed by the record: On January 20, 1887, James Bradford executed to Edward Dewey a note and mortgage for \$1,000, due January 1, 1892, and payable at the First National Bank at Montpelier, Vt. The loan was negotiated through Carlos C. Burr of Lincoln, Nebraska, who guaranteed the payment of the note in the following language: "For value received, I guarantee payment of this note and coupons at

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Montpelier, Vt., and waive notice, demand and protest. (Signed.) C. C. Burr." Some time after the execution of the note and mortgage in suit, Bradford sold the land to Peoples, appellee, who thereafter made all payments. As the interest coupons from time to time matured, Peoples would purchase a draft at the bank in Harlan county for the amount of the coupon and forward it to Burr at Lincoln, who would remit the amount to Dewey, and in return Dewey would send the coupons to Burr, and the latter would forward them to Peoples. At the maturity of the note, Peoples, not being prepared to pay, came to Lincoln, and was told by Burr that if he would pay \$250 bonus, he, Burr, would grant an extension for one year. Peoples accordingly paid to Burr this sum, and executed a coupon for a year's interest payable to Dewey. This coupon was by Burr sent to Dewey, who retained it, consenting to the year's extension. About the time the year's extension expired, Burr wrote to Peoples that if he would pay \$20 he would extend the loan for another year. However, Peoples was ready to pay, and declined the offer, remitting to Burr a draft covering the principal and unpaid interest. Burr acknowledged receipt, and wrote Peoples that the payment lacked \$7.55 of being in full of the amount due, and said that if that sum were sent, he would procure and send the papers to Peoples. Peoples accordingly made the additional payment requested, but Burr never procured the papers and never remitted the money to Dewey.

Appellee, Peoples, although the note and coupons were made payable to Dewey in Vermont, seems never to have paid any attention to this fact, but to have gone upon the theory that because Burr negotiated the loan, payment to him would be satisfaction of the debt. Burr testified that he had negotiated loans for Dewey to the amount of about \$50,000, and had frequently collected both interest and principal; that at times when he made these collections he had the papers, and at other times he had not; and that in the case at bar, he did not have

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the note at the time of the collection of the principal. Dewey testified that Burr was never authorized to make any collection of either principal or interest, and that as the coupons and principal matured, they were sent to Burr, and that the latter had remitted them as they came due, and that Dewey supposed Burr was remitting them on account of his having guaranteed their payment. It seems very clear that the evidence does not sustain the findings of the trial court. It is established, first, that Burr negotiated the loan; second, that he collected the money in payment of the coupons, and as to all except the last, remitted such amounts to Dewey, and when the latter received them, he forwarded to Burr the coupons paid, and that he granted an extension for one year, taking a coupon for interest payable to Dewey. The evidence also discloses that he had negotiated loans for Dewey to the amount of about \$50,000 and that he had never had in his possession the principal note in this case from the time he guaranteed its payment and forwarded it to Dewey. These propositions, established by the evidence as detailed, do not support the finding of the trial court that Burr was authorized to collect the money.

The principal of law governing transactions like this is so well settled that citations are deemed unnecessary. The maker of a negotiable instrument is charged by the law merchant with knowledge of its negotiable character, and payment by him to another than the holder or his agent will not be a defense to an action on such note. If this rule sometimes results in the obligation of the maker to pay the amount of the note twice, such misfortune is attributable alone to the carelessness of the payor, who has, by failing to demand the surrender of the note, placed the one without authority or right to receive the payment in a position to occasion the loss. In such cases the equitable maxim always governs, that when one of two innocent persons must suffer, the loss must fall upon him who trusted most. The burden in this case was upon appellee, Peoples, to establish the

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authority of Burr to receive payment for Dewey. *First National Bank of Omaha v. Chilson*, 45 Neb., 257. The mere fact that Burr collected coupons does not establish authority to collect the principal note. In the case of *Richards v. Waller*, 49 Neb., 639, this court said: "The fact that a person, or company, is authorized to receive the installments of interest which become due on a mortgage note or bond is not sufficient ground from which to infer that the authority also exists to collect or receive the principal sum, if the evidences of the indebtedness are not and have not been in the possession of such person or company." We have made a careful examination of the evidence, and it fails to disclose an act or agreement on the part of Dewey from which a legal conclusion can be drawn that Burr was his agent to collect the principal of this note. It is therefore recommended that the decree of the district court be reversed, and the cause remanded for further proceedings.

HASTINGS and DAY, CC., concur.

REVERSED AND REMANDED.

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THE CHESHIRE PROVIDENT INSTITUTION, PLAINT, V.  
JOHN A. GIBSON ET AL., APPELLEES.

FILED JANUARY 22, 1902. No. 10,133.

Commissioner's opinion. Department No. 1.

1. **Mortgages: ASSIGNMENT: RELEASE: GOOD FAITH PURCHASER.**  
Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee. *Whipple v. Fowler*, 41 Neb., 675.
2. **Principal and Agent: MORTGAGES: PAYMENT TO AGENT.** Payment of a mortgage debt to the agent of an undisclosed principal will extinguish the debt.
3. **Appeal and Error: EVIDENCE: MORTGAGES: PAYMENT TO AGENT.** Evidence examined, and *held* to sustain the finding and judgment of the trial court.

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APPEAL from the district court for Harlan county. Tried below before BEALL, J. *Affirmed.*

*Cobb & Harvey*, for appellant.

*T. L. Porter, R. L. Keester and C. L. Miller, contra.*

KIRKPATRICK, C.

This is a suit brought by the Cheshire Provident Institution of New Hampshire against J. A. Gibson and others to foreclose a mortgage executed by Gibson on April 13, 1886, for \$600 payable to Carlos C. Burr at the First National Bank at Lincoln, Nebraska. Plaintiff alleges that it purchased the note and mortgage from Burr in the usual course of business for value before maturity some time after its execution, and that it has ever since been the owner thereof. Jackson Friskie, one of the defendants, answered, setting up that on the 7th day of December, 1892, the mortgage mentioned in the petition was duly released of record by C. C. Burr, and that the amount thereof had been fully paid and satisfied, and that on the 23d of September, 1895, nearly three years thereafter, he purchased the land in controversy from J. P. Roll, and received from him a warranty deed, warranting the title to be free and clear of all incumbrances except as to a mortgage for \$1,400 due and payable to C. E. Bullock; that Roll had in turn purchased the land of Gibson, the mortgagor. E. E. Atwater answered, setting up substantially the same facts, and that on the 1st day of December, 1892, he had taken a mortgage on the premises to secure the sum of \$75, said premises appearing of record to be free and clear of all incumbrances except as to a mortgage of \$1,400. C. E. Bullock answered, setting up that on the first day of December, 1892, J. P. Roll was the owner and in possession of the land in controversy, and that Bullock loaned to Roll \$1,400, relying upon the abstract of title showing that the said Roll was the owner of said premises, and that the same were clear

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and free of incumbrances. To these various answers plaintiff filed a reply, alleging that it purchased the note and mortgage in suit from C. C. Burr shortly after their execution, and that Burr had no right or authority to release the mortgage of record, and that his pretended release was null and void; that on the first day of December, 1892, when Bullock and Atwater took their mortgages, the mortgage in suit had not been released; and that Roll negotiated the loan for \$1,400 with C. E. Bullock for the purpose of paying off and satisfying the mortgage mentioned in the petition and other incumbrances, equalling the sum of \$1,400; that the said Bullock undertook to pay the party in interest and discharge of record the note and mortgage mentioned in plaintiff's petition, and that said Bullock through his agent had carelessly and negligently paid the money to Burr to procure a release and discharge from him, knowing that Burr was not the owner of the note and mortgage, or with sufficient knowledge to put a reasonably prudent man upon inquiry as to the ownership of the note and mortgage; concluding with a prayer that if the court should find that if it was not entitled to foreclosure of its note and mortgage as against Friskie, the owner of the land, it might have a decree that the amount due on its mortgage be paid from the amount represented by Bullock's mortgage. No assignment of the mortgage in suit from Burr to plaintiff was ever made. The trial court found that the note and mortgage had been paid and satisfied in full, and that the same was a cloud on the title of Jackson Friskie, and found in favor of the defendants, Bullock and Atwater, and against plaintiff, and entered a decree, dismissing plaintiff's petition at its cost, and quieting title to the premises in Friskie, subject only to the mortgages of Bullock and Atwater. From this decree plaintiff prosecutes appeal to this court.

The record discloses that J. P. Roll, on December 1, 1892, desiring to pay off the mortgage which had been given to Burr, applied to the agent of C. E. Bullock for



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a loan of \$1,400 to pay off the Burr mortgage and another mortgage on the same tract to another party. Bullock's agent communicated with him in the east, and he agreed to make the loan of \$1,400, provided that would pay off all the incumbrances on the land, and that an abstract would be provided showing a clear title. Bullock's agent then notified Roll that he would make him the loan of \$1,400 and that he, Roll, should communicate with Burr, and the party holding the other mortgage, and have releases of both mortgages sent to the bank at Alma, in Harlan county, to be delivered on payment of the amount due. This was done, and about December 7 the release of the mortgage in suit, and the other mortgage covering the same land, were at the bank at the place stated. Bullock's agent went to the bank with Roll, and the \$1,400 were there paid, and both mortgages were satisfied and released of record, the abstract brought down to date, and the papers sent east to Bullock, who approved the transaction, supposing that he had a first mortgage on the premises. The testimony shows that Jackson Friskie purchased the land in controversy more than three years after the mortgage in suit had been released, and received a warranty deed and an abstract showing perfect title, having no notice that plaintiff claimed any interest in the premises, and relying upon the record showing the mortgage satisfied. Under this state of facts, the rule is well settled that he took the land free and clear of any lien on account of plaintiff's mortgage. *Whipple v. Fowler*, 41 Neb., 675; *Cram v. Cotrell*, 48 Neb., 646. This leaves as the only question in the case whether plaintiff is entitled to a first lien for the amount of its note and mortgage as against Bullock's mortgage, and this depends upon whether or not Burr was the agent of plaintiff and authorized to collect the note in suit, and release and discharge the mortgage. The facts and circumstances in this case, as disclosed by the record, are in all material respects identical with the facts and circumstances in the case of *Cheshire Provident Institution v. Feusner*, 63

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Neb., 682. In fact the exhibits and depositions which constitute all the material evidence in the case are practically identical. This being true, we do not deem it necessary to set out the evidence in detail. It is sufficient to say, that the trial court, after hearing all the evidence, found that Burr was the duly authorized agent of plaintiff for the collection of the debt sued upon, and that he did collect it in full, and discharged the mortgage of record. It seems clear that this finding is supported by sufficient competent evidence, and it will not be disturbed. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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THOMAS F. MALONEY V. THE COUNTY OF DOUGLAS ET AL.

FILED JANUARY 22, 1902. No. 10,718.

Commissioner's opinion. Department No. 1.

**Attorney and Olient: LIENS: PRIORITIES.** As against a client or client's assignee, an attorney engaged in prosecuting a claim before a county board has a lien for his services without filing claim or giving notice, and an assignee, whose rights arise while the matter is pending, takes subject to the attorney's rightful fees.

**ERROR** from the district court for Douglas county. Tried below before POWELL, J. *Affirmed.*

*I. J. Dunn*, for plaintiff in error.

Time when attorney's lien attaches upon money in the hands of a third person. *Elliott v. Atkins*, 26 Neb., at page 409.

Right of client to assign a chose in action free from any claim for an attorney's fee, where no lien has been filed. *Sheedy v. McMurtry*, 44 Neb., 499, 63 N. W. Rep., 21.

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*G. W. and Wm. G. Doane, contra.*

An attorney's lien cannot be defeated by an assignment of the fund. The purchaser takes subject to the lien. *Griggs v. White*, 5 Neb., 467; *Boyer v. Clark*, 3 Neb., 161; *McCain v. Portis*, 42 Ark., 402; *Central Railroad & Banking Co. v. Pettus*, 113 U. S., 116; *Schwartz v. Jenney*, 21 Hun [N. Y.], 33; *In re Bailey*, 66 How. Pr. [N. Y.], 64; *Shapley v. Bellows*, 4 N. H., 353; *Ward v. Watson*, 27 Neb., 768; *Rice v. Day*, 33 Neb., 204; *Reynolds v. Reynolds*, 10 Neb., 574.

No notice to the client or to his assignee is required to create a lien upon the fund in the hands of a debtor in favor of an attorney who has been retained to prosecute the claim. *Sayre v. Thompson*, 18 Neb., at page 43.

An agreement between attorney and client that the attorney shall have a certain amount out of the fund as compensation for his services, constitutes a valid equitable assignment of the judgment *pro tanto*, which attaches to the judgment as soon as entered. *Steward v. Hilton*, 19 Blatchf. [U. S.], 290; *Williams v. Ingersoll*, 89 N. Y., at page 518; *Longworth v. Handy*, 2 Disney [Ohio], 75; *Cunningham v. McGrady*, 2 Bax. [Tenn.], 141.

HASTINGS, C.

Two questions are presented in this case. One, whether or not it is necessary to enable an attorney to retain his lien against a client's assignee that such lien be filed and notice given as is required to make it valid against the opposing party. The second is, simply, whether or not the prosecution of a claim against a county is a proceeding in which a lien may be acquired. The questions arise in this way: One Mary Ellen Costello had a claim against Douglas county for certain lots which had been taken for public use. The claim was like to that of certain other parties whose property had been similarly taken. Proceedings before the county board were commenced by Doane & Doane on behalf of the owners, Miss

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Costello among the rest. One of the claims was acted upon and an appeal taken from the action of the county board. The claim in this action was then "hung up" to await the final action of this court on the other. It was in the meantime assigned by Miss Costello to Thomas F. Maloney. Finally the leading claim was acted upon favorably by this court. The county board then found the assignment to Maloney on file, also a new claim by him, and a claim of Doane & Doane for an attorney's lien of fifty per cent. of the amount to be allowed. The board then entered an order allowing Maloney's claim, subject to Doane & Doane's claim of lien, and directed that a warrant issue only on joint receipt of Maloney and Doane & Doane. This receipt was not forthcoming, and the county filed a petition setting out the facts, and tendering payment of the money to whomsoever the court should say was entitled to it, and asking a determination of that question. The parties answered, Maloney claiming the money in right of his assignment and the board's allowance of it, and Doane & Doane claiming one-half of it as an agreed attorney's fee. The district court awarded Doane & Doane one-half of it as an attorney's fee, and Maloney brings error to reverse that judgment, basing his claim of error on the two grounds that his assignment was taken some two years before the lien was filed, and that the statutory provision for an attorney's lien does not include one for services before the county board in procuring allowance of a claim.

The questions do not seem to be settled by any direct decisions of this state. The provisions of our statute allow a lien upon money of a client in the opposing parties' hands. It is claimed that this money was not money of a client of these attorneys after the assignment. It appears, however, that the assignment of the claim recited that it was filed. The filing was by these attorneys, and their claim was copied with some changes by Maloney, and they continued to prosecute the claim pending in this court on which that one depended. They were not dis-

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charged, and the finding of the trial court that they earned the agreed fee is supported by evidence. The money was still in the opposing parties' hands and in buying the claim and failing to discharge the attorneys, Maloney became their client. In buying the claim too he took only so much of it as Miss Costello could assign, that is so much as was not covered by Doane & Doane's contract, at least to the extent that it had been then performed. *Heartt v. Chipman*, 2 Ark. [Vt.], 162; *Sexton v. Pike*, 13 Ark., 193; *Renick v. Ludington*, 16 W. Va., at page 398; *Frink v. McComb*, 60 Fed. Rep., 486.

Counsel for plaintiff in error concede that no notice was necessary as against the client. They cite no case holding that the client's assignee was, or is, in any better position. We can see no reason why one who buys a claim, then in an attorney's hands, and being by that attorney prosecuted before a judicial tribunal, should not be held to take it subject to all the attorney's rights in it as against his original client. There seems no good reason for refusing to regard the hearing before the county board as a "proceeding" within the meaning of the attorney's lien provision. The phrase "action or proceeding" in which the lien is given is certainly broad enough to include the prosecution of a claim before a county board. It would seem that neither of the grounds on which this decree is assailed is well taken.

It is recommended that the judgment of the trial court be affirmed.

**DAY and KIRKPATRICK, CC., concur.**

**AFFIRMED.**

Harrison Nat. Bank of Cadiz v. Williams.

HARRISON NATIONAL BANK OF CADIZ, OHIO, APPELLANT, v.  
IRVIN WILLIAMS ET AL., APPELLEES.

FILED JANUARY 22, 1902. No. 10,772.

Commissioner's opinion. Department No. 1.

1. **Principal and Agent: ESTOPPEL OF PRINCIPAL.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. *Holt v. Schneider*, 57 Neb., 523, followed.
2. **Principal and Agent: OSTENSIBLE AUTHORITY OF AGENT.** Ostensible authority to act as agent may be inferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb., 644, and *Phoenix Insurance Co. v. Walter*, 51 Neb., 182, followed.
3. **Appeal and Error: EVIDENCE: AGENCY ESTABLISHED.** Evidence examined and held to support the finding of the trial court.

APPEAL from the district court for Chase county. Tried below before NORRIS, J. *Affirmed.*

*Abbott, Selleck & Lane* and *S. S. Bishop*, for appellant.

*Charles G. Ryan, Chas. W. Mecker* and *William O'Connor*, contra.

DAY, C.

On May 5, 1895, the plaintiff commenced this suit in the district court for Chase county against the defendants, praying for the foreclosure of a real estate mortgage executed by the defendant, Irvin Williams, on November 23, 1886, to C. O. Burr. The mortgage was given to secure the payment of a coupon note of \$300 due January 1, 1892, but which by agreement was subsequently extended to January 1, 1893. The defendant, George E. Howard, was a subsequent purchaser of the mortgaged premises and assumed the payment of the mortgage. The

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defense interposed was payment to Burr on September 21, 1894, who, it was alleged, was the agent of the plaintiff to receive payment. The court below found for the defendants and decreed a cancellation and discharge of the mortgage. To review this judgment the plaintiff has brought the case to this court by appeal.

There is no question but that the amount of the note was paid to Burr. The only question which needs to be considered is whether the facts proven, establish that Burr was the plaintiff's agent in receiving the money upon the note and mortgage. It appears that Burr for a number of years prior and subsequent to the transaction now in controversy was engaged in the business of negotiating real estate loans. He had customers in different eastern cities for whom he placed these loans, usually taking them in his own name and indorsing and guaranteeing the payment to his principal. Burr at different times would receive orders from the plaintiff to place a certain amount of loans for it, and in pursuance of this direction sent a number of loans to the plaintiff, drawing upon it for the amount. Burr testifies that he never made loans until he received an order for them. It also appears that Burr collected the interest coupons as they became due and remitted the proceeds of such collections for a number of years, and in many instances the principal debt. He also invested the money on many of these loans; extended the time of payment; commenced suits in foreclosure and did such acts as would certainly seem to indicate a general authority over the plaintiff's loans in this state. All his acts and doings seem to have met the approval and acquiescence of the plaintiff until it was discovered that he had collected some of the loans for which he had failed to properly account. That the officers of the plaintiff were frequently in Lincoln and knew the manner in which Burr was transacting the business, is unquestioned. To sustain the contention of the appellee that Burr was the general agent of the plaintiff, a large number of letters were introduced, selected from two or three thousand

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which constituted the correspondence between the plaintiff and Burr. It would be impossible to give even a summary of the contents of these letters, but they are of such a character as to impress us that the plaintiff was intrusting the entire management and control of its loans to Burr. All the interest coupons were sent to him for collection and he would notify all the borrowers, and when collected would remit. In many instances he would collect the principal and his act was not only ratified but commended.

The question of agency—its scope and authority—is to be determined by the facts established. And the fact that plaintiff had permitted Burr for a period of years to collect not only the interest on this loan, but to extend its payment and collect the principal upon other loans or renew them as his judgment dictated, are facts which strongly tend to establish his agency. The facts of this case bring it within the doctrine announced in *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb., 480, in which it was ruled: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." The case at bar is also within the rule laid down in *Thomson v. Shelton*, 49 Neb., 644, where it is said: "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." In *Holt v. Schneider*, 57 Neb., 523, the above quoted authorities were approved. That case also grew out of the transaction of Burr, and in its facts is strikingly similar to the case at bar.

Upon a review of the entire testimony we are satisfied that the judgment of the lower court is supported by the



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evidence. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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LEBANON SAVINGS BANK OF LEBANON, NEW HAMPSHIRE,  
APPELLANT, v. JOHN HENRY BLANKE ET AL., APPELLEES.

FILED JANUARY 22, 1902. No. 10,806.

Commissioner's opinion. Department No. 1.

1. **Principal and Agent: ESTOPPEL OF PRINCIPAL.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. *Holt v. Schneider*, 57 Neb., 523, followed.
2. **Principal and Agent: OSTENSIBLE AUTHORITY OF AGENT.** Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb., 644, and *Phoenix Insurance Co. v. Walter*, 51 Neb., 182, followed.
3. **Appeal and Error: EVIDENCE: AGENCY ESTABLISHED.** Evidence examined and *held* to support the finding of the trial court.

APPEAL from the district court for Chase county. Tried below before NORRIS, J. *Affirmed*.

*Flansburg & Williams*, for appellant.

*C. W. Meeker & J. H. Broady*, contra.

DAY, C.

On August 20, 1887, John H. Blanke obtained a loan of \$500 from the Lebanon Savings Bank of Lebanon, New Hampshire, and as evidence thereof executed his coupon bond due January 1, 1893, in favor of the plaintiff, secured by a mortgage upon real estate in Chase county. The negotiations were conducted on the part of the plain-

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tiff by C. C. Burr a loan broker of Lincoln, Nebraska. This suit was brought February 8, 1895, in the district court for Chase county to foreclose the above described mortgage. The answer of the defendants admitted the execution and delivery of the note and mortgage but by way of defense pleaded payment on March 7, 1893, to C. C. Burr, who, it was alleged, was the agent of the plaintiff. Upon the trial the court found generally for the defendants that the note and mortgage had been fully paid, and decreed a cancellation and discharge of the mortgage. To review this judgment the plaintiff has brought the case to this court by appeal. There is no doubt of the payment having been made to Burr.

The only question presented by the record which needs to be considered is whether the facts proven show Burr to have been the agent of the plaintiff in the collection of the principal upon the loan. The testimony shows that for a number of years prior and subsequent to the making of this loan, Burr was conducting a loan business at Lincoln, Nebraska. In some instances he would make the notes and mortgages payable to himself, guarantee the payment of principal and interest and sell the notes and mortgages to his eastern correspondents. At other times, as in this case, the note and mortgage were made payable direct to his customer. The transactions between plaintiff and Burr were of considerable magnitude, involving loans in this state to the amount of \$200,000. It appears also that Burr made the loan, collected and remitted the interest for a number of years, and in a great many instances collected and remitted the principal upon loans made by him with full knowledge on the part of the plaintiff that he was conducting its business in this manner. Sometimes he would remit the money thus collected, at other times would send in lieu of cash new loans to balance his account with the plaintiff. The business between Burr and the plaintiff was carried on by correspondence which was very extensive, one of the witnesses placing the number of letters passing between them at 1,000. Some of the letters which

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were introduced show clearly that plaintiff knew of the manner in which Burr was conducting its business, some were relating to collections of the principal sum upon the loans due and to become due, others were asking for statements of their accounts and others asking for new loans. In one, a list of names was given in which their loans were due and unpaid and asking for a report on each and contained this sentence: "When parties do not pay at maturity we would prefer to have some understanding in regard to extension of time." The whole tenor of this correspondence impresses us that Burr was the general agent of the plaintiff to look after its business and keep its interest and principal collected and invested in securities; that it was cognizant of the manner in which he was conducting its business there seems to be no question.

The facts of this case bring it within the doctrine announced in *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb., 480, in which it was ruled: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." The case at bar is also within the rule laid down in *Thomson v. Shelton*, 49 Neb., 644, where it is said: "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." To our minds there was sufficient evidence to warrant the conclusion reached by the trial court that Burr was the plaintiff's agent in receiving the principal sum due upon this loan. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Omaha Carpet Co. v. Clapp.

OMAHA CARPET COMPANY ET AL. V. CHARLES E. CLAPP,  
ADMINISTRATOR OF THE ESTATE OF JOHN S. CAULFIELD,  
DECEASED.

FILED JANUARY 22, 1902. No. 10,888.

Commissioner's opinion. Department No. 1.

1. **Limitation of Actions: WAIVER.** Question of the statute of limitations, if not raised in any manner in the lower court, will be deemed waived and not considered here.
2. **Action on Indemnity Bond to Sheriff: DEFENSE, MERITS OF ADJUDICATED CLAIM.** Where an officer indemnified against judgments on account of a levy has on the strength of the indemnification held property against a third party's claim, the merits of that party's action, in which judgment has gone against the officer and been paid, can not in the absence of any stipulation to that effect be inquired into in a suit on the indemnity bond.
3. **Action on Indemnity Bond to Sheriff: JUDGMENT WITHIN TERMS.** In such a case, in the absence of fraud or collusion, the sole question is whether the judgment is fairly included in the terms of the bond.
4. **Action on Indemnity Bond to Sheriff: PENALTY: INTEREST.** In a suit on a bond with a penalty, interest can be added to the full amount of the penalty only from the date of the breach alleged.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed upon remittitur.*

*B. N. Robertson*, for plaintiffs in error.

*B. G. Burbank*, contra.

HASTINGS, C.

This is an action upon an indemnity bond. April 24, 1888, the Omaha Carpet Company procured an attachment in the county court of Douglas county against the New York Storage & Loan Company, and on the same day, by direction of the Carpet Company's attorney, the writ was levied upon merchandise already in the sheriff's possession on an execution issued against the same company upon a judgment in favor of one Hall, which judgment had been confessed by the president of

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the Storage & Loan Company. One Watson was claiming the goods and the carpet company was informed by the sheriff that he would release them unless indemnity was furnished. It was furnished that afternoon by a bond in the sum of \$620, conditioned as follows:

"Now the condition of the above obligation is such, that if the above bounden Omaha Carpet Company shall well and truly save harmless and indemnify the said Wm. Coburn, sheriff, and any and all persons aiding and assisting him in the premises, from all harm, trouble, damage, costs, suits, actions, judgments and executions, that shall or may at any time arise, come, or be brought against him, them, or any of them, then this obligation to be void; otherwise to be and remain in full force and effect."

Summons was served in the carpet company's case and judgment was rendered in its favor on May 8 for \$309.80 and costs, but without mention of the attachment. On May 10, the sheriff returned the writ stating the facts as to the levy. No further proceedings were taken by the carpet company. Watson had commenced his action in the district court of Douglas county to restrain the storage and loan company and its officers from interfering with the goods and claiming them under a chattel mortgage. Immediately after the carpet company's levy another writ of attachment in favor of Dell R. Edwards was levied upon these same goods previously held on the Hall execution and the carpet company's attachment and also upon some other goods. An indemnity undertaking in similar terms in the sum of \$1,955 was given by Hall, and one by Dell R. Edwards for \$3,500. Mrs. Edwards commenced an action against the storage and loan company and Hall to enjoin the collection of Hall's judgment and have it declared void. Subsequently she commenced another action against the storage and loan company and Watson to avoid the latter's mortgage, and asked also that a receiver be appointed to take possession of the storage and loan company's property. These two actions of Edwards were consolidated with the one first brought by Watson and a

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receiver was appointed to whom the sheriff turned over all the goods levied upon. Watson set up his mortgage in the consolidated action. In that action the Hall judgment was found fraudulent and void and Edwards's attachment was found to be no lien and Watson's mortgage was held a *bona fide* and paramount lien for the sum of \$4,493.62. In July, and before the appointment of a receiver, Watson commenced an action against the sheriff for conversion of all the goods levied upon. In that action such proceedings were had that at the January, 1898, term of this court, a judgment in favor of Watson and against the sheriff was affirmed, and about September 30, 1898, \$5,416 was paid by the sheriff to Watson to discharge it. This money is claimed to have been paid by Caulfield, and the sheriff's indemnities to have been assigned to him. He was a surety on the sheriff's bond. There is no allegation of damages other than such as arose from the payment of this judgment, and in fact this action is brought to recover on this indemnity bond for the money paid out in discharge of Watson's judgment in the conversion action. At the trial in the lower court, each of the parties at the close of the evidence moved for a peremptory instruction for a verdict. The court overruled the defendants' motion and sustained that of plaintiff, and instructed the jury to return a verdict for the penalty in the bond and interest on that amount from the date on which it was given.

It is first urged that plaintiff's petition disclosed no cause of action, because it shows that no action was begun upon this indemnity bond given in April, 1888, until December, 1898, and that the statute of limitations had run. It is a sufficient answer to this to say that it seems conceded by the brief of plaintiffs in error that the objection of the statute of limitations was not interposed in any way at the trial in the court below and it must therefore be deemed waived. *Taylor v. Courtnay*, 15 Neb., 190; *Alexander v. Meyers*, 33 Neb., 773. It would seem, too, that plaintiff would be justified in treating the enforcing of

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payment upon Watson's judgment as a new breach of the bond and a fresh cause of action, even if there had existed a previous right to bring suit on a mere liability, which is by no means clear. At all events the cause of action alleged here is the bond and its breach by reason of compulsion to pay Watson's judgment and the failure to reimburse. In this connection it seems clear that the right to demand the penalty of the bond accrued so far as the petition in this action discloses only on the payment of the money, and it would therefore seem that it was error for the court to instruct the jury to return a verdict for the amount of that penalty with interest from the giving of the bond. It would seem that the utmost that could be legally demanded would be the amount of that penalty and interest from the time when it is claimed that the demand arose, viz., on the payment of this judgment, September 30, 1898, and that the plaintiff had no right to recover interest for more than ten years intervening between those dates. Certainly no right under these pleadings to demand this money had arisen in April, 1888.

It is next claimed, and seems to constitute the defense most relied upon, that the facts do not disclose any breach of this bond; that the goods in fact were not converted by the sheriff by means of this levy of the carpet company's attachment; that he incurred no additional liability on its account and was put to no loss because of it. This is claimed on the ground of his having the property already in his possession under the Hall execution and on the further ground that the carpet company's attachment was abandoned by reason of not being sustained or attempted to be enforced when judgment was taken in the carpet company's action. This was before the suit was instituted in which Watson obtained his judgment. This last action was in July, and in May the carpet company had taken judgment on their claim without any sustaining of their attachment. It is claimed that taking this mere personal judgment released the levy, and as no goods were ever taken on the carpet company's attachment nor held under



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it against any demand, no liability was incurred on the indemnity bond.

The trial court seems to have taken the view, sanctioned by this court in *Pasewalk v. Bollman*, 29 Neb., 519, that the indemnity being absolute against all judgments renders the defendants liable on the bond when judgment was rendered against the sheriff in reference to these goods even without notice to these indemnitors and without regard to the merits of the action in which it was obtained, so long as it was not the result of fraud or collusion. It is to be said that the condition of the bond in the case under consideration is identical with that in the case of *Pasewalk v. Bollman*, above. It would seem, therefore, that the liability of the defendants is absolutely fixed if judgment was recovered against the sheriff on account of these goods upon which they induced him to levy the attachment. The identity of the goods is not disputed. There seems to be no claim in the record that the sheriff was notified of a release of the carpet company's attachment. It appears that the sheriff in the case of *Watson v. Coburn*, 35 Neb., 492, attempted to justify under the carpet company's writ. It is not denied that the sheriff refused to hold the goods without indemnity, and that thereupon this bond was furnished by the carpet company. The liability was incurred to that extent on its behalf and the judgment of *Watson* was therefore a liability which the defendants here had agreed to indemnify him against. If the *Watson* judgment is, as we think, fairly to be included among those against which the terms of this bond requires the defendants to furnish indemnity, then it is sufficient in amount to absorb the entire penalty on this bond. These considerations would seem sufficient to dispose of the case. In our view, however, under the allegations and proof in this case the defendants were liable for the penalty named in this bond only when the plaintiff and his principal, Coburn, paid the *Watson* judgment. The interest from the date of the bond to the time of such payment, September 30, 1898, at seven per cent. seems to have been included



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in this verdict without warrant of law. The amount of that interest is \$452.80.

It is recommended that if plaintiff within thirty days herefrom remits from the original judgment in this case, the said sum of \$452.80, that the judgment be affirmed as to the remainder, with interest on the remainder from the date of its rendition, and that a mandate issue for an execution thereon; and that unless such remittitur is filed a new trial be awarded, and that plaintiffs in error also recover costs in this court.

DAY and KIRKPATRICK, CC., concur.

If defendant in error within thirty days file a remittitur for \$452.80 of the original judgment, the remainder thereof with interest thereon from its date is affirmed; and, in case such remittitur is not filed within said time, this judgment is reversed and the case remanded for further proceedings; and plaintiffs in error may also recover costs in this court.

AFFIRMED UPON REMITTITUR.

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OMAHA SAVINGS BANK, APPELLEE, v. JAMES TRACY ET AL.,  
APPELLANTS.

FILED JANUARY 22, 1902. No. 10,985.

Commissioner's opinion. Department No. 3.

Judicial Sales: OBJECTIONS TO APPRAISAL.

APPEAL from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*L. H. Kent*, for appellants.

*W. R. Morris*, contra.

AMES, C.

This is an appeal from an order confirming a judicial sale of real estate. The sole ground of complaint is that

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the property was appraised and sold too low. There is no charge of fraud or of irregularity in the proceedings. It has been repeatedly decided by this court that in such case the order of confirmation can not be successfully assailed. *Brown v. Fitzpatrick*, 56 Neb., 61, and cases cited.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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R. A. SIMPSON, TRUSTEE FOR CAROLINE ROBERTS, APPELLEE,  
v. WILLIAM H. SNOOK ET AL., IMPEADED WITH  
CHARLES E. CONRAD ET AL., APPELLANTS.

FILED JANUARY 22, 1902. No. 10,987.

Commissioner's opinion. Department No. 3.

1. **Mortgages: OBJECTIONS TO APPRAISAL.** Objections to an appraisement of real estate, offered for sale under a decree of foreclosure, to be available must be made before sale.
2. **Exceptions, Bill of: MORTGAGES: EVIDENCE OFFERED ON OBJECTIONS TO APPRAISAL.** Such objections are unavailable unless the evidence offered thereon is preserved in bill of exceptions.

APPEAL from the district court for Webster county.  
Tried below before BEALL, J. *Affirmed.*

*A. M. Walters, for appellants.*

*P. A. Wells, contra.*

ALBERT, C.

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. The only complaint made in the argument is that the premises were appraised too low. We do not find from the record that the appraisement was assailed by motion or otherwise, before the sale, neither do we find any evidence that would justify a re-

Van Meter v. Province.

versal of the order, even had the appraisement been assailed opportunely.

We recommend that the order of confirmation be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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S. J. VAN METER v. U. S. PROVINCE.

FILED JANUARY 22, 1902. No. 11,009.

Commissioner's opinion. Department No. 3.

**Appeal and Error: CONFLICTING EVIDENCE.** The judgment of a district court founded upon conflicting evidence will not be disturbed.

**ERROR** from the district court for Custer county. Tried below before SULLIVAN, J. *Affirmed.*

*Alphonso Moore*, for plaintiff in error.

*Chas. L. Gutterson*, contra.

AMES, C.

This is a petition in error to review the judgment of the district court for Custer county in an action brought by the defendant in error, to obtain a decree canceling and setting aside a conveyance by himself to the plaintiff in error, of a tract of land situate in that county. The ground of the action is, that the conveyance was procured by fraudulent representations and without consideration. After a trial upon the merits of the issue, the court found both generally and specifically in favor of the plaintiff below and entered a decree accordingly. The sole assignment of error urged upon the attention of this court, in the brief of the plaintiff in error, is, that the judgment is not supported by sufficient evidence, but the view most favorable to him that can be taken of the record is, that the evidence is conflicting, and it is well settled that in such a case the judgment of the court below will not be disturbed.

Creamery Package Mfg. Co. v. Magill.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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CREAMERY PACKAGE MANUFACTURING CO. V. WILLIAM H.  
MAGILL ET AL.

FILED JANUARY 22, 1902. No. 11,012.

Commissioner's opinion. Department No. 3.

**Appeal and Error: FINAL ORDER.** In the absence of a final judgment, or final order, in an action tried to a jury, proceedings of the trial court will not be reviewed.

ERROR from the district court for Brown county. Tried below before WESTOVER, J. *Petition in error dismissed.*

*McFarland & Altschuler*, for plaintiff in error.

*P. D. McAndrew*, contra.

ALBERT, C.

This is a proceeding in error, whereby it is sought to reverse a judgment of the district court for Brown county. We have searched the record with care and it does not appear that there is any judgment or final order upon which such proceedings may be predicated. We find the verdict of the jury and the ruling of the court on the motion for a new trial, at which point the record stops abruptly.

We recommend that the petition in error be dismissed.

AMES and DUFFIE, CC., concur.

PETITION IN ERROR DISMISSED.

Reynolds v. Fagan.

JOHN REYNOLDS, APPELLEE, V. EDWARD FAGAN, APPELLANT,  
ET AL.

FILED JANUARY 22, 1902. No. 11,032.

Commissioner's opinion. Department No. 2.

1. **Judicial Sale: OBJECTIONS TO APPRAISAL.** Where the record and the evidence shows that the appraisers were qualified and possessed the requisite knowledge of the value of the real estate described in the order of sale, it is not necessary that the appraisement be made in actual view of the premises.
2. **Judicial Sale: OBJECTION TO PLACE WHERE HELD.** The sale having been made at the door of the court house, an objection that it was not made in the court room, or at the door of the court room, the room in the court house where the decree was rendered, is untenable.

APPEAL from the district court for Sherman county.  
Tried below before GRIMES, J. *Affirmed.*

*R. J. Nightingale*, for appellant.

*Wall & Williams*, contra.

BARNES, C.

This is an appeal from an order confirming the sale of real estate. The objections to the sale and confirmation were: 1st. That the appraisement was not made in actual view of the premises. 2d. That the sale was made at the door of the court house when it should have been made at the door of the court room, or in the court room where the court was held and the decree rendered.

1. The record and the evidence taken on the hearing below show that the sheriff called one of the appraisers and that they went together to the home of the other appraiser, who was a neighbor of appellant, and lived within half a mile of the land to be appraised. Finding him absent from the house they continued on their way to the premises in question. Arriving there they, by actual view thereof, ascertained the value of the land. They there-

Armington v. Maben.

upon returned to the house of the other appraiser and, without returning to the premises, the three made the appraisement. It is shown that the appraiser, who lived near the land, knew the value of it, and no complaint is made that the appraisement was not a fair one and for the actual cash value of the land. We are satisfied that the law was substantially complied with and the court properly overruled the first objection to the sale and confirmation.

2. Section 503 of the Code provides that "All sales of lands and tenements under execution shall be held at the court house, if there be one in the county in which such lands and tenements are situated, and if there be no court house, then at the door of the house in which the district court was last held." The record shows that there was a court house in Sherman county at the time of the sale and that the sale was made at such court house.

The objection that it was not made in the room, in the court house where the decree was rendered, or at the door of such room, can not be considered or sustained. The proceedings conformed to the requirements of the law and the order of the district court confirming the sale should be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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JAMES H. ARMINGTON, APPELLEE, v. GROVER C. MABEN,  
APPELLANT, ET AL.

FILED JANUARY 22, 1902. No. 11,033.

Commissioner's opinion. Department No. 2.

**Judicial Sales: FILING COPY OF APPRAISAL: COMPLIANCE WITH STATUTE.**

When a copy of the appraisal of real estate is filed in the office of the clerk of the district court, before the land is advertised for sale, and has attached thereto the applications for and certificates of liens, the filing mark being placed on the copy of the appraisal alone, there has been a substantial compliance with the requirements of section 491d of the Code.

Armington v. Maben.

APPEAL from the district court for Wheeler county. Tried below before THOMPSON, J. *Affirmed.*

*T. J. Doyle*, for appellant.

*S. D. Thornton*, contra.

BARNES, C.

This appeal was taken from an order confirming a sale of real estate. The objections to the sale are: 1st. That no copy of the appraisement had ever been filed in the office of the clerk of the district court as required by law. 2d. That no copy of the certificates of liens was ever filed in the office of the clerk of the district court, as provided by law. 3d. That the property was not advertised for thirty days prior to the sale, as required by law.

The record and the evidence taken upon the hearing show that the order of sale was issued on the 15th day of March, 1899. That on the 27th day of March, the sheriff caused the property to be appraised; and on the next day a copy of the appraisal was filed in the office of the clerk of the district court and that the applications for certificates of liens, together with such certificates, were attached to the copy of this appraisal. The filing mark was placed thereon but no filing marks were placed upon the applications and certificates of liens. On the 30th day of March the sheriff caused the property to be advertised for sale, that being the date of the first publication, and the date of sale was fixed for May 1, 1899. The notice of sale was published five weeks, the date of the last publication being April 27, 1899.

The court found that there had been a substantial compliance with the statutes, overruled the objections and confirmed the sale. We think the record, and the evidence contained in the bill of exceptions, is sufficient to sustain the findings and order of confirmation and that the decree confirming the sale should be affirmed.

POUND and OLDFHAM, CC., concur.

**AFFIRMED.**

Magruder v. Kittle.

MARY C. MAGRUDER, APPELLEE, v. ADELAIDE KITTLE, ADMINISTRATRIX OF THE ESTATE OF ROBERT KITTLE, DECEASED, APPELLANT.

FILED FEBRUARY 6, 1902. No. 9853.

Commissioner's opinion. Department No. 3.

1. **Mortgage Foreclosure: APPEAL: SUPERSEDEAS.** A supersedeas bond given by the defendant in a foreclosure proceeding will not operate to stay a sale under the decree unless the defendant has perfected his appeal within the time required by statute.
2. **Writ of Assistance: MORTGAGE FORECLOSURE.** A court making a sale under a decree of foreclosure may, when necessary, issue a writ of assistance to put the purchaser in possession.

APPEAL from the district court for Dodge county. Tried below before MARSHALL, J. *Affirmed.*

*Robert Kittle, for appellant.*

*Doyle & Berge, contra.*

DUFFIE, C.

From a decree foreclosing a mortgage, the defendant attempted an appeal to this court. The transcript filed was not authenticated by the clerk of the district court within the time limited for taking an appeal, and November 16, 1897, the appeal was dismissed by this court. In the meantime, the mortgaged premises had been sold and the sale confirmed. The defendant refused to surrender possession of the premises and on application to the district court, a writ of possession issued, from which order this appeal is taken.

In her brief the appellant seeks to attack the decree of foreclosure, as well also as the appraisement of the property and the order confirming the sale. No objection was made in the district court, either to the appraisement or to the regularity of the sale, and the appellant has no standing here to question those proceedings, unless it be for want of jurisdiction in the district court to make the



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sale. Want of jurisdiction is urged, and the reason given is that a supersedeas bond had been filed by the appellant to stay proceedings under the decree of foreclosure. That a supersedeas will stay the enforcement of the decree pending an appeal, no one questions, but to have that effect the appeal must be perfected within the time limited by the statute. The decree in this case was entered October 16, 1895, but a certified transcript was not filed in this court until June 21, 1897, more than twenty months after the entry of the decree in the district court. After the time for taking an appeal had elapsed, an order of sale was issued and a sale of the premises was made. There was no irregularity in this. To obtain the benefit of a supersedeas the appellant must perfect his appeal within the time allowed; if he does not do so, he is presumed to have abandoned it, and the supersedeas no longer stands in the way of the enforcement of the decree.

No other points deserving attention are raised, unless it be the claim made by the appellant that the appellee was not entitled to the summary process of a writ of assistance to obtain possession of the property, but was limited to an action in ejectment. It has always been our understanding that a court which makes a sale of real property has power to put the purchaser in possession and for this purpose may issue its writ on the application of the purchaser.

We therefore recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Boyd v. George.

**JAMES E. BOYD V. JOHN D. GEORGE, ADMINISTRATOR OF THE  
ESTATE OF THOMAS MULVIHILL, DECEASED.**

FILED FEBRUARY 6, 1902. No. 10,452.

Commissioner's opinion. Department No. 1.

1. **Landlord and Tenant: TERMINATION OF LEASE.** Where the lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor takes possession himself, or accepts rent from another, such change of possession by mutual agreement operates as a surrender and termination of the lease.
2. **Landlord and Tenant: EVIDENCE: SUFFICIENCY.** Evidence examined, and found to sustain the verdict.
3. **Appeal and Error: INSTRUCTIONS.** Instructions given examined, and *held* correctly to state the issues involved in the case.

ERROR from the district court for Douglas county.  
Tried below before SEDGWICK, J. *Affirmed.*

*Parke Godwin*, for plaintiff in error.

*Meikle & Gaines*, contra.

KIRKPATRICK, C.

This action was brought in the district court for Douglas county by James E. Boyd, plaintiff in error, against Thomas Mulvihill, defendant in error, to recover \$21,950 upon a guaranty of the payment of rent and the performance of the covenants of a lease made by plaintiff in error to his brother, Thomas F. Boyd, in 1891, to run for a term of five years, or until September 1, 1896. Plaintiff prayed judgment for rent from December 10, 1894, to September 1, 1896, amounting to the sum stated. At the time of the trial, it was conceded that defendant in error was insane, and a guardian *ad litem* was appointed, who in his answer filed, first denied all the allegations of the petition not thereafter admitted; and, second, alleged that on or about the 1st day of September, 1894, the lessee, Thomas F. Boyd, by and with the consent of plaintiff in error, surrendered the premises to plaintiff in error, who took pos-

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session and continued to occupy them from that time until the commencement of this action. He further pleaded that at the time the lease was so surrendered, defendant in error was of unsound mind, incapable of entering into any valid contract, and further alleged that defendant in error had never been in possession of the premises as lessee, but that plaintiff in error had at all times since September 1, 1894, been in possession either by himself or by his agent. To this answer a general denial was filed. The jury returned a verdict for defendant, and the court entered judgment dismissing plaintiff's action at his cost. Plaintiff prosecutes error to this court.

An examination of the record discloses the following facts: In May, 1891, plaintiff in error executed a lease of the Boyd theatre in Omaha to his brother, Thomas F., at an agreed rental of \$18,000 per annum, and in addition two-thirds of the net proceeds of the theatre. The lessee failed to pay rent promptly, and was in arrears in the sum of \$10,000 on September 1, 1894. At that time the lessor and his brother had an altercation, which resulted in the former telling the latter to quit the premises, which he did. James Boyd then told Haines, who was manager of the theatre, to take charge, until he could see Mulvihill, who had guaranteed the payment of the rent and the performance of the conditions of the lease. Later, and about December 8, an arrangement was entered into between James E. Boyd and Mulvihill, by which the lease running to Thomas F. Boyd was assigned to Mulvihill, who agreed to assume its obligations. It is uncontradicted that at this time Mulvihill was insane and incapable of contracting. This action was brought upon Mulvihill's guaranty of the original lease of May, 1891, at which time it is conceded Mulvihill was sane.

Plaintiff in error contends that Mulvihill was never released from this guaranty, that it remained in full force and effect, and that Mulvihill was in possession and control of the theatre up to the expiration of the lease, September 1, 1896, and is therefore liable for the rent. De-

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fendant in error contends that at the time of the trouble between the Boyds on December 1, 1894, the lease was surrendered by agreement of both parties, that plaintiff in error thereupon took possession and remained in control at all times thereafter, thus discharging him of all liability as guarantor; and further, that by reason of his incapacity on December 8, 1894, the pretended assignment of the lease to him is void.

Plaintiff in error, when asked on the trial for his version of the altercation between himself and his brother, Thomas, which resulted in the latter's leaving the theatre, said that he was remonstrating with Thomas about the unpaid rent, when Thomas said, "You can take your d—— theatre, I can get a better position in fifteen minutes." Thereupon plaintiff in error insisted upon having money to the credit of the theatre in a bank checked over to him at once, and in response to the question, "What else was said?" replied, "That is about all. He was never in there afterwards until about three years. I didn't keep track of him." Another witness, George Kearney, testified to the same conversation, which occurred in the presence of several. The proposition of building a new theatre, he said, was under discussion, Thomas Boyd insisting that it ought to be built. In reply, James E. Boyd told Thomas that he could not run one theatre, let alone two. Then ensued the controversy over the management, the delinquent rent, the increased expenses, Thomas Boyd contending that the rent was too high, and plaintiff in error retorted, "You signed the lease. You can quit now if you want to," to which Thomas replied, "All right." It was agreed that Thomas should take what salary was coming to him, and with the statement that he could get a better position in fifteen minutes, he left the building, whereupon plaintiff in error turned to Haines, and said "You take charge of affairs now." The witness was asked if Thomas ever came back and took charge of the theatre, and replied that he never saw him do so, although the witness was there every day. In a subsequent conversation with plaintiff in error, the

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witness asked, "Is there any chance of Tom Boyd coming back?" to which plaintiff in error replied, "No. I don't want him around here."

In further appears that from the 8th day of December, 1894, up to the time Mulvihill was sent to the asylum for the insane in 1895 or 1896, he served at the theatre in the capacity of a bill poster, and drew his salary regularly for such services from the proceeds of the business. It is also shown that he was allowed certain passes into the performances by the manager on account of his employment as bill poster; also, that he had to use a large number of these passes to secure privileges in the way of bill boards throughout the city for advertising purposes, and that he paid \$175 to the manager for passes received in excess of his usual individual allowance. All these facts are inconsistent with the theory of plaintiff in error that Mulvihill was in possession and running the theatre.

From the evidence detailed, it seems to be clearly established that about December 1, 1894, by mutual agreement between the lessor, James E. Boyd, and the lessee, Thomas F. Boyd, the lease was terminated, after which Thomas left the theatre permanently. Subsequently to this event, it appears that plaintiff in error sought to get Mulvihill to secure the unpaid rent, and assume the lease, but these negotiations were carried on without any regard for Thomas, until the assignment of the lease to Mulvihill, previously drawn up, was presented to Thomas F. Boyd for his signature. He refused to sign until released of all liability under its terms, doubtless having in contemplation the \$10,000 unpaid rent.

It has been frequently held that when the lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor takes possession himself, or accepts rent from another, such change of possession by mutual agreement operates as a surrender of the lease. *Wheeler v. Walden*, 17 Neb., 122; *Buffalo County National Bank v. Hanson*, 34 Neb., 455; *Amory v. Kannoisky*, 117 Mass.,

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351; *Patchin v. Dickerman*, 31 Vt., 666; *Dills v. Stobie*, 81 Ill., 202; *Schuisler v. Ames*, 16 Ala., 73; *Terstegge v. First German Mutual Benefit Society*, 92 Ind., 82; *Vandekar v. Reeves*, 40 Hun [N. Y.], 430; *Denouvion v. Hodgson*, 23 La. Ann., 438.

The jury by their verdict seem to have found that about the first day of December, 1894, there was a surrender of the lease by mutual agreement, that plaintiff took possession of the premises, and remained in possession thereafter. This finding is abundantly supported by the evidence and will not be disturbed. This leaves for consideration the correctness of the court's instructions. No particular error in the instructions is pointed out or insisted upon. The court submitted the question whether the lease between plaintiff in error and Thomas Boyd was in fact, by agreement between them, terminated. This was the theory of the defendant in error, and, as we have seen, was sustained by the evidence. Plaintiff in error contends that this question ought not to have been submitted, because there never was a surrender of the lease, but an assignment of it to Mulvihill, who being concededly insane at the time, the assignment was void, and that the parties therefore stand in the same relation as if no assignment had been attempted. As to the assignment by Thomas Boyd, and the undertaking of the defendant in error to assume the obligations of the lease, this position is correct; but it does not change the fact that prior to such attempted assignment the lease had, by operation of law, been terminated between the parties thereto, both treating it as having been surrendered, and plaintiff in error no longer looking to Thomas Boyd for any portion of the rent. The instructions given very fairly presented the question for determination, and we find no error in them or in the refusal of those requested. It is therefore recommended that the judgment be affirmed.

HASTINGS and DAY, CC., concur.

**AFFIRMED.**

• Brown v. Houghton.

**J. R. P. BROWN V. SAMUEL HOUGHTON.**

FILED FEBRUARY 6, 1902. No. 10,593.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: ASSIGNMENTS NOT IN BRIEFS.** Assignments of error not argued or relied on in briefs of counsel will be deemed waived.
2. **Pleading: DEMURRER TO ANSWER OVERRULED: DISMISSAL UPON FAILURE TO PLEAD.** In an action for an accounting, wherein the answer in addition to a general denial pleads a final settlement between the parties, and plaintiff demurs to such answer on the ground that it does not state facts sufficient to constitute a defense, and after an adverse ruling elects to stand on his demurrer, refusing to plead further, a judgment of dismissal by the trial court is proper.
3. **Judgment: EFFECT OF DEMURRER UPON RECORD.** A demurrer searches the entire record, and judgment must go against him whose pleading was first defective in substance.

**ERROR** from the district court for Cuming county.  
Tried below before EVANS, J. *Affirmed.*

*Brome & Burnett*, for plaintiff in error.

*M. McLaughlin*, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Cuming county by plaintiff in error against defendant in error for an accounting. The action taken by the trial court, as disclosed by the record, is as follows: "Plaintiff asked leave, and was granted leave, to withdraw his reply, and asked and obtained leave to demur to defendant's answer; and said demurrer was submitted to the court, and the court being fully advised, overrules said demurrer, to which ruling plaintiff excepts. And said plaintiff electing to stand upon his demurrer, and declining further to plead, it is therefore considered and adjudged by the court said plaintiff's cause of action be dismissed, that he take nothing by his writ; that the defendant go hence

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without day, and recover his costs herein expended, taxed at \$——." From this judgment of dismissal plaintiff prosecutes error to this court.

In his brief filed, plaintiff in error does not contend that the court erred in overruling the demurrer to defendant's answer, but contends only that the court erred in dismissing the action without a trial upon the merits. The settled rule is that errors not argued in briefs will be deemed waived, and this leaves but a single question for determination, namely, whether the judgment of dismissal was proper. The answer filed by the defendant consists principally of evidential facts, argumentative denials, and legal conclusions, and if the question had been raised and presented to the trial court by a motion to strike, very nearly all of the answer would without doubt have been stricken out. It may be said, however, that the entire answer taken together contains enough to amount to a general denial of all material matters pleaded in the petition, and in addition to such denial, the following: "The defendant further alleges that on or about the 15th day of November, 1888, the plaintiff and defendant, at the request of said plaintiff, sold at public vendue, all the stock, the agricultural implements on said farm, except five horses, a haystacker and sweep, horse-rake, two stirring plows, 3 double farm wagons, about 15 head of cattle and a few hogs. Said sale aggregated \$3,249.20, and at said time there was a full and complete settlement between the plaintiff and defendant of all matters between them under said contract, and the plaintiff turned over to this defendant as his share and interest in said stock and implements the sum of \$1,500 in notes taken upon said sale." To this answer plaintiff submitted a general demurrer, and thereby admitted that portion of the answer hereinbefore set out to be true.

The rule is elementary in this state, that when assailed by a general demurrer, a pleading will be liberally construed with a view to sustaining it, if taken together it states facts sufficient to entitle the pleader to relief. The



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submission of the case on the demurrer of plaintiff to the answer of the defendant is a trial of the cause, and it would be wholly a matter within the discretion of the trial court whether or not after an adverse ruling upon the demurrer plaintiff would be permitted to plead further.

In Bliss, Code Pleading [3d ed.], section 417, it is said: "As a demurrer presents an issue upon which the parties go to trial, judgment must necessarily be rendered upon the decision, unless the demurrer be withdrawn and further pleading permitted. If it be overruled, the demurrant, if he wishes to make an issue of fact, should ask leave to withdraw his demurrer, and to answer or reply as the case may be. Without a formal application, leave to plead to the merits, followed by such pleading, is treated as such withdrawal."

In *Beaumont v. Herrick*, 24 Ohio St., at page 446, it is held that a submission of a cause on a demurrer to the answer, interposed on the ground that the answer does not contain a defense, is a final submission unless leave is obtained to reply or amend, and that without additional pleadings, the legal consequence of the overruling of such a demurrer was a judgment of dismissal.

Plaintiff in error upon the overruling of his demurrer refused to plead further, and the court accordingly entered a judgment of dismissal. To this ruling the plaintiff in error took no exceptions, and he was at that time no doubt satisfied with the action of the trial court. It would seem that if, as alleged by defendant in error, there had been a full and complete settlement of all the matters set out in the petition, unless plaintiff in error sought to set aside this settlement on the ground of fraud or mistake, there was nothing in the case to litigate. Again, the action of the trial court seems to have been correct, for the reason that the petition filed by plaintiff in error wholly failed to state a cause of action. We have very carefully examined the voluminous petition filed by plaintiff in error, and at no place in the petition do we find any

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allegation that there is any amount due plaintiff in error from defendant in error, or that upon an accounting anything would be found due. In the absence of these allegations, the petition failed to state a cause of action. It would be unreasonable to contend that the time of the courts should be taken up in accountings between individuals in cases where the party seeking the accounting does not claim that there is anything due him, and this would be especially true where the plaintiff admits that the matters in controversy between the parties have been settled. A demurrer searches the entire record, and judgment must go against the party whose pleading was first defective in substance. *West Point Power & Land Improvement Co. v. State*, 49 Neb., 223; *State v. Stuht*, 52 Neb., at page 223; *State v. Moores*, 52 Neb., at page 777.

It follows that there is no error in the record, and it is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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WENZEL HERDLITCHKA ET AL. V. SARAH FOSS ET AL.

FILED FEBRUARY 6, 1902. No. 10,668.

Commissioner's opinion. Department No. 2.

1. **Wills: RIGHTS OF LEGATEES IN RESIDUARY ESTATE.** If a will gives legacies generally and also gives the residue of the real and personal estate in one mass, the legacies constitute a charge upon the whole residuary estate, real as well as personal.
2. **Executors and Administrators: BONDS: LIABILITY FOR LEGACIES: WILLS.** Executors who are also residuary legatees and have given bond under section 165 of the decedent act, take the estate free of the lien of such legacies, but if, instead of such bond, the bond required of a general executor is given, such legacies will be a charge upon the estate.
3. **Wills: EXECUTOR A RESIDUARY LEGATEE: RIGHTS OF PURCHASER.** A purchaser of land from an executor who derives his title through the will as residuary legatee is bound by the terms of the will which impose a charge upon the land.

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ERROR from the district court for Richardson county. Tried below before STULL, J. *Affirmed.*

*J. H. Broady*, for plaintiffs in error.

The language of the will does not charge the land with the payment of legacies. 29 Am. & Eng. Ency. Law [1st ed.], 352-354; *Lupton v. Lupton*, 2 Johns. Ch. [N. Y.], 614; *Leigh v. Savidge*, 14 N. J. Eq., at page 134.

The bond given became a substitute for the estate. 1 Woerner, American Law of Administration, 434; Compiled Statutes, section 2679; *Thompson v. Brown*, 16 Mass., 179; *Thayer v. Winchester*, 133 Mass., 447.

*W. S. Baird* and *E. A. Tucker*, contra.

The language of the will charges the land with the payment of legacies. Beach, Law of Wills, section 248; *Cook v. Lanning*, 40 N. J. Eq., 369; *Scott v. Stebbins*, 91 N. Y., 605; *Hoyt v. Hoyt*, 85 N. Y., 142; *Hoover v. Hoover*, 5 Pa. St., 351; *Cable's Appeal*, 91 Pa. St., 327-329; *Thayer v. Finnegan*, 134 Mass., 62; *Gardner v. Gardner*, 3 Mason [U. S.], 178; *Taft v. Morse*, 4 Met. [Mass.], 523; *King v. Denison*, 1 Ves. & Bea. [Eng.], 260; 4 Kent, Commentaries, 541; 2 Redfield, Wills, 210, citing *Harris v. Fly*, 7 Paige Ch. [N. Y.], 421; *Dickinson v. Worthington*, 4 Hughes [U. S.], 430; Beach, Law of Wills, section 255; *Lofton v. Moore*, 83 Ind., 112; 1 Dembitz, Land Titles, section 98, page 752; *Aston v. Galloway*, 3 Ired. Eq. [N. Car.], 126; *Devereux v. Devereux*, 78 N. Car., 386; *Henry v. Griffis*, 56 N. W. Rep. [Ia.], 670; *Birdsall v. Hewlett*, 1 Paige Ch. [N. Y.], 32; *Merrill v. Bickford*, 65 Me., 118; *Wycoff v. Wycoff*, 48 N. J. Eq., 113, 21 Atl. Rep., 287; *Schank v. Arrowsmith*, 9 N. J. Eq., 314; 2 Jarman, Wills [5th ed.], sections 596, 603, 604, 605, 606, 620; 13 Am. & Eng. Ency. Law [1st ed.], 117; *In re Newcomb's Will*, 67 N. W. Rep. [Ia.], 587; 2 Woerner, American Law of Administration [1st ed.], section 491; *Bray v. Lamb*, 2 Dev. Eq. [N. Car.], 372; *Biddle v. Carraway*, 6 Jones Eq. [N. Car.], 95; *Allegheny National Bank v. Hays*, 12 Fed. Rep., 663;

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*Hartson v. Elden*, 50 N. J. Eq., 522; 3 Ballard, Law of Real Property, section 450; Hawkins, Wills, [2d ed.], 294; *In re Weiler's Estate*, 169 Pa. St., 66, 32 Atl. Rep., 101; *Will of Root*, 81 Wis., 263, 51 N. W. Rep., 435; *Turner v. Gibb*, 22 Atl. Rep. [N. J.], 581.

The conditions in the bond prevented its substitution for the estate. *Buel v. Dickey*, 9 Neb., at page 292; *Thayer v. Winchester*, 133 Mass., 447; *Lafferty v. People's Savings Bank*, 76 Mich., 35; *Burns v. Berry*, 42 Mich., 176; *Winegar v. Newland*, 44 Mich., 367; *Hoffman v. Beard*, 32 Mich., 218.

SEDGWICK, C.

This case was brought to this court from the district court for Richardson county upon proceedings in error. It involves the construction of the will of Richard S. Molony, Sr. The will and codicil were executed at the same time. Defendants in error, who were plaintiffs below, were legatees in the will and codicil, each being given a specific annuity, and they seek in this action to have their annuities declared a charge upon the land and enforced by a sale of the land. The defendants (plaintiffs in error) claim through the same will. Two children of the testator were residuary legatees, and were also appointed executor and executrix of the will. No power to sell land is expressed in the will. Without an order of court, the executors sold the land in question to defendants, who took their warranty deeds therefor, for full value as innocent purchasers without any notice of defects in the title, except constructive notice given by the public records, the will having been duly probated and recorded. The trial court found that there was no personal estate, and this finding is supported by the evidence.

1. The first question is: Did the will make these legacies a charge upon the land? It contained these provisions: "Said legacies to be paid by my executor out of my estate," and "I give and devise all the residue of my estate both real and personal to my two children,

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Annie H. Neeley and Richard S. Molony, Jr., to be divided equally between them and to their heirs forever." Under these provisions there can be no doubt that the legacies were made a charge upon the land. "If legacies be given generally, and afterwards the *residue* of the real and personal estate be given in one mass, the legacies constitute a charge upon the whole residuary estate, real as well as personal." Beach, *Law of Wills*, section 248; *Turner v. Gibb*, 48 N. J. Eq., 526, 22 Atl. Rep., 580; *In re Will of Newcomb*, 98 Ia., 175, 67 N. W. Rep., 587.

2. The plaintiffs in error insist that their grantors, being executor and executrix of the will, and having given the bond prescribed by the statute to be given by residuary legatees, the land thereby became absolutely the property of the residuary legatees.

Our Compiled Statutes, section 2679, Decedent act, section 165, provides that executors who are residuary legatees may give a bond conditioned "to pay all the debts and legacies of the testator," and when such bond is given, they take the estate absolutely. The bond takes the place of the property so far as creditors and other legatees are concerned. *Buel v. Dickey*, 9 Neb., 285. But the bond given in this case did not comply with the provisions of the statute in that regard. Its condition was not to pay all the debts and legacies of the testator, but so to administer "according to law and to the will of the testator, all his goods, chattels, rights, credits and estate, which shall at any time come to their possession or to the possession of any other person for him, and out of the same shall pay and discharge all debts, legacies and charges, chargeable on the same, or such dividends thereon as shall be ordered and decreed by the county court." This bond clearly did not comply with the provisions of the statute relied upon.

3. The defendants having taken their title from the devisees named in the will were bound to take notice of the title of their grantors as disclosed by the record, and cannot now claim any right as innocent purchasers. The

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decree of the district court fixed these legacies as charges upon the land.

It is recommended that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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ALLEN BOURNE, APPELLEE, v. EVALINE O'CONNER, ADMINISTRATRIX OF THE ESTATE OF THOMAS O'CONNER, DECEASED, APPELLANT.

FILED FEBRUARY 6, 1902. No. 10,821.

Commissioner's opinion. Department No. 1.

**Appeal and Error: CONFLICTING EVIDENCE.** Where the evidence is conflicting, but sufficient competent evidence is in the record to support the finding, the judgment will not be set aside by a reviewing court.

APPEAL from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

*C. A. Baldwin and I. R. Andrews, for appellant.*

*Wharton & Baird, contra.*

KIRKPATRICK, C.

This is a suit brought in the district court for Douglas county by Allen Bourne, appellee, against Thomas O'Conner, and others, appellants, to foreclose a mortgage given on the 20th day of May, 1892, by Thomas O'Conner and wife, Ann O'Conner, to the Mutual Investment Company, and by it assigned to appellee before maturity. The petition is in the usual form for the foreclosure of mortgages, and, in addition, pleads that Ann O'Conner died after the execution of the mortgage and some years before the commencement of this suit. Thomas O'Conner filed an answer, in which he denied the execution of the mortgage, both on his part and on the part of Ann O'Conner, his

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wife, and pleaded that he signed the note and mortgage for the purpose of securing a loan for \$7,000, and that his wife, Ann O'Conner, refused to sign the mortgage and never did sign it, but that his wife's name was signed to the mortgage by his daughter, Theresa O'Conner. A reply was filed, admitting that the wife never signed the mortgage, but alleging that her name was signed by her daughter, Theresa, in her presence and upon her direction, and that Ann O'Conner duly acknowledged the execution of the mortgage to be her voluntary act and deed. Trial was had which resulted in a decree foreclosing the mortgage. Pending the prosecution of the appeal of the cause to this court, Thomas O'Conner died, and the action was revived in the name of his daughter, Evaline O'Conner, his administratrix.

The only question involved in the controversy is one of fact, namely, whether or not Theresa O'Conner signed the name of her mother to the note and mortgage in suit under the direction and at the request of her mother, Ann O'Conner, and whether or not Ann O'Conner acknowledged the execution of the mortgage as required by law. The evidence in the case, briefly stated, is as follows: The notary public who took the acknowledgment swears positively that he went to the residence of the O'Connors and in the presence of Thomas O'Conner and his daughter, Theresa, asked Mrs. Ann O'Conner to execute the note and mortgage in suit; that Ann O'Conner told him that she did not write her own name, and that her daughter, Theresa, usually signed her name for her, and had done so to several mortgages, and would do so in this case; that, accordingly, Thomas signed the mortgage, and his daughter, Theresa, in the presence of her mother, wrote her mother's name to the bond, coupons and mortgage. The notary says that he then took the mortgages (there being a commission mortgage in addition to the principal mortgage) and Thomas O'Conner having acknowledged the mortgage, presented them to Mrs. Ann O'Conner, and asked her whether the execution was her voluntary act



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and deed, and that she replied it was. He then took the mortgages to the bank and filled out the acknowledgments in regular form.

Thomas O'Conner, his daughter, Theresa, and his daughter, Katie, each testify that the notary came to the house for the purpose of taking the mother's acknowledgment, and that the mother then and there informed the notary that she would not execute the mortgages and would have nothing to do with the matter; that the notary then returned to the bank. Thomas O'Conner testified that he then went to the bank, and that the officers of the bank informed him that it would be sufficient if his daughter, Theresa, signed her mother's name to the note and mortgage, and that accordingly he and Theresa, in the afternoon, went to the bank and there executed the papers in the bank; that they had no ink in the office at home, and that no papers were signed there, and that Theresa signed her mother's name to the note, mortgages and coupons at the bank in the presence of her father; that the mother was not present and knew nothing about the signing of her name to the note and mortgage. The testimony of Thomas O'Conner and Theresa O'Conner is corroborated by that of the daughter, Kate, to the extent that she testifies that her father and sister left home to go to the bank.

The officers of the bank, three in number, in addition to the notary public, who was also a clerk in the bank, all testify that no papers were signed at the bank except that Thomas O'Conner signed the bond and coupon there; that the officers of the bank informed Thomas O'Conner that his daughter, Theresa, could not execute the note and mortgages for her mother except in her mother's presence, and that the notary left the bank in company with Thomas O'Conner and his daughter, Theresa, to go to the home of the O'Connors to take the acknowledgment of the mother, and that in due time the notary returned to the bank with the papers executed.

The commission note and mortgage, and four of the



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coupons on the principal bond were paid before the commencement of this suit, and at no time prior thereto was the question ever suggested by Thomas O'Conner, or by his wife during her lifetime, that the latter had not properly acknowledged the execution of the mortgage. \$5,000 or \$6,000 of the money obtained on this loan were used to pay off a prior mortgage on the same property, to which it is admitted Theresa O'Conner signed her mother's name, but whether by the authority of her mother or not does not appear.

The determination of the question involved was peculiarly for the trial court before whom the witnesses appeared. After hearing all the evidence the trial court found that Ann O'Conner directed her daughter, Theresa O'Conner, to execute the note and mortgage in suit, and that the mother acknowledged such execution to be her voluntary act and deed. We have carefully examined the evidence, and we are unable to say that the finding of the trial court is not sustained by sufficient competent evidence. It is not the province of this court to reverse a finding and judgment of a trial court because it may appear that a preponderance of the evidence is against such finding and judgment. If there is a conflict of the evidence, and the finding of the trial court is supported by sufficient competent evidence, this court will not interfere with such finding. *Graham v. Frazier*, 49 Neb., 90. There is ample evidence in the record to sustain the finding of the trial court. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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WILLIAM DOERING, APPELLANT, v. B. V. KOHOUT, SUBSTITUTED FOR MATHEW G. GREBE, ET AL., APPELLEES.

FILED FEBRUARY 6, 1902. No. 10,870.

Commissioner's opinion. Department No. 3.

1. Pleading: DENIAL OF "MATERIAL ALLEGATION": WAIVER. A married woman held title to certain real estate and a judgment creditor of her husband filed a bill to subject the property to the payment of his judgment. The answer among other allegations contained the following: "Defendant denies every material allegation of the petition." *Held*, That as the plaintiff did not in any manner question the sufficiency of this answer in the district court he could not on appeal, treat it as insufficient, or as confessing the allegations of the petition.
2. Creditor's Suit: APPEAL AND ERROR: EVIDENCE. Evidence examined and *held* to warrant the decree entered.

APPEAL from the district court for Thayer county. Tried below before HASTINGS, J. *Affirmed*.

*J. N. Rickards*, for appellant.

*T. C. Marshall* and *C. L. Richards*, *contra*.

DUFFIE, C.

The plaintiff and appellant commenced this action to subject certain lands standing in the name of Mary E. Grebe to the satisfaction of a judgment held by him against Mathew G. Grebe, the husband of Mary E. Grebe. North, the holder of a mortgage on the premises, was made a party, it being alleged in the petition that his mortgage was paid, but not released of record. The decree found that the mortgage held by North had not been fully paid, and declared it a first lien on the premises in favor of North for the amount yet due. There was a general finding in favor of Mrs. Grebe and the bill was dismissed as to her. The plaintiff has appealed from the decree and questions its correctness only so far as it finds in favor of Mrs. Grebe.

In her answer Mrs. Grebe "denied every material alle-

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gation of the petition." It is urged that this is not good pleading, and does not put the plaintiff to the proof of the facts alleged in his petition. Conceding this to be true, as we think we must, if it had been sought to take advantage thereof at the proper time and in a proper manner, still as the plaintiff did not in any manner question the sufficiency of the answer by motion or demurrer or by motion for judgment on the pleadings, and further did not object to the introduction of evidence thereunder, but treated it as presenting an issue to be tried by the court, we have no doubt that he can not in this court for the first time insist on the insufficiency of an answer which he accepted as presenting a good defense and calling on him for proof in support of the allegations of his petition. It would not be fair either to the trial court or to the defendant for us to treat as insufficient an answer which was not in anywise called in question in the district court. A careful examination of the record satisfies us that there is evidence sufficient to support the findings of the court, and under the rule so long in force in this state, that the findings of fact of the trial court will not be disturbed when supported by competent testimony, we could not, even should we disagree with the trial judge as to the weight of the testimony, disturb the findings.

Complaint is made that the district court allowed Mrs. Grebe to retain this property although purchased with money furnished by her husband, upon the ground that such money was exempt to him as wages received as a traveling salesman which he could dispose of as he saw fit. We are unable to find anything of the kind in the record. The evidence is quite conclusive that Mrs. Grebe had loaned money to her father. She had also received some amount from her mother's estate, and had made a profit of about \$700 on the purchase and sale of another tract of land, all of which was invested in the premises in controversy. It is true that her husband testified that after supporting his family, he gave to his wife from

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month to month, anything remaining of his monthly salary, but this he states was in payment of a debt due her. We find nothing in the record which should work a reversal of the case, and therefore recommend that the decree of the district court be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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WILLIAM DOERING, APPELLANT, v. B. V. KOHOUT, SUBSTITUTED FOR MATHEW G. GREBE, ET AL., APPELLEES.

FILED JULY 1, 1902. No. 10,870.

Commissioner's opinion. Department No. 3.

Creditors' Suit: EVIDENCE: PLEADING. Evidence examined and former opinion adhered to.

REHEARING of case reported *ante*, page 436.

APPEAL from the district court for Thayer county. Tried below before HASTINGS, J. *Former opinion of affirmance adhered to.*

*J. N. Rickards* and *F. I. Foss*, for appellant.

*T. C. Marshall*, *C. L. Richards* and *Stewart & Munger*, *contra.*

DUFFIE, C.

The former opinion in this case is reported *ante*, page 436, and in 89 N. W. Rep., 268, under the title of *Doering v. Kohout*. The brief of appellant filed in support of his motion for a rehearing, called our attention to the evidence in such a manner as to lead us to doubt the correctness of the first opinion, and for that reason we desired to re-examine the record in the light of the appellant's brief, fearing that an injustice might have been done. A careful examination of all the evidence in the

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case serves to confirm our former views and leads us to the conclusion that the district court entered the proper decree. The appellant, being a judgment creditor of Mathew G. Grebe, seeks to subject to the payment of his judgment the northwest quarter of section 6, township 1, of range 4 west, in Thayer county, the record title of which stands in the name of Mary E. Grebe, the wife of Mathew, under the claim that the land was purchased with his money and the title taken in the name of his wife. In 1885 Grebe was in the mercantile business in DeWitt, Nebraska. His stock in January of that year invoiced at \$9,000. In July he sold out to M. D. Haddox for \$7,400. At that time he was indebted to W. V. Morse & Co., of Omaha, in the sum of \$5,868.51. Morse was a witness entirely disinterested in the result of this suit and we have no reason to doubt his statement as to the amount of the indebtedness. In payment for his stock of goods Grebe took from Haddox 480 acres of Iowa land, which was incumbered by a mortgage for \$5,500, and two notes, one for \$3,400 and one for \$800. Shortly after the trade, Grebe conveyed the Iowa land to W. V. Morse & Co. to secure the amount owing them, and they sold and conveyed the land but without realizing sufficient to pay the amount of the indebtedness. The two Haddox notes were never paid and were at the date of the trial in the possession of Grebe and are attached to the bill of exceptions in this case. Grebe also owned a store building at DeWitt which was incumbered by a mortgage for \$1,000 and this mortgage was foreclosed and the property taken by the mortgagee. At the same time Grebe was indebted to a bank in DeWitt for which Mrs. Grebe stood as surety. Mrs. Grebe was the owner of five lots in DeWitt which she had purchased with money given her by her mother, and these lots were taken by the bank upon the debt of her husband for which she was surety.

The evidence is somewhat contradictory regarding the manner in which Mrs. Grebe became the owner of the land in controversy in this suit. We think, however, that

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it bears out the claim of the appellee that her brother, a land agent, first purchased in her name a tract of land, allowing his commission of \$75 to be used as the first payment thereon. Some time afterward this land was sold at a profit of \$700 which, together with something over \$200 received in the way of rents, was used to purchase the land in suit. At the time of the purchase the land was incumbered by a mortgage, and the appellant claims that Grebe's money was used to discharge the mortgage liens and to this extent at least it ought to be subject to the payment of the judgment against him. After Grebe lost his property he secured a position as traveling salesman, and appellee claims that he gave his wife what remained of his salary from month to month after supporting his family, to be applied to the indebtedness due her from him, and that in this manner a fund was accumulated with which the mortgage indebtedness against the land was discharged.

It is quite apparent that Grebe was indebted to his wife in the sum of at least \$500, the value of her lots which were taken to satisfy Grebe's debt to the DeWitt bank, and that he had a right to use his salary to pay this debt if he chose so to do, even though he was not legally liable therefor. The salary which he earned from month to month was exempt to him under our statute and whatever remained after supporting his family could be used by him in any way he saw fit, regardless of the claims of creditors upon him. If he chose to give this salary or any part of it to his wife, his creditors have no legal cause of complaint, and upon this branch of the case it is wholly immaterial whether any debt existed in favor of his wife or not. From a careful re-examination of the record we see no reason to change the opinion at which we first arrived, and therefore recommend that the decree of the district court be affirmed.

AMES and ALBERT, CC., concur.

JUDGMENT BELOW REAFFIRMED.

Marferding v. Jones.

H. P. MARFERDING ET AL. V. ARCH S. JONES.

FILED FEBRUARY 6, 1902. No. 10,873.

Commissioner's opinion. Department No. 3.

**Appeal and Error: ABSENCE OF TRANSCRIPT: LIQUORS.** A judgment of a district court, on an appeal from an order of an excise board, granting a license to sell malt, spirituous and vinous liquors, will not be reviewed by this court in the absence of a duly certified transcript of the application, remonstrance and the final order of such board in the premises.

ERROR from the district court for Lancaster county.  
Tried below before CORNISH, J. *Affirmed.*

*A. G. Wolfenbarger, T. F. A. Williams and F. J. Kelley,*  
for plaintiffs in error.

*R. D. Stearns, contra.*

ALBERT, C.

This is a proceeding in error, brought to reverse a judgment of the district court, purporting to affirm an order of the excise board of the city of Lincoln, granting a license to the defendant in error to sell malt, spirituous and vinous liquors in said city, over the remonstrance of the plaintiffs in error. The record does not contain the application, the remonstrance or the final order of the excise board in the premises. There is what purports to be a bill of exceptions, and it contains matters which might have been intended to supply the omissions named. But the bill of exceptions is certified in the usual form by the trial judge, and there is attached thereto the certificate of the clerk, which is also in the usual form. It is nowhere certified that any of the papers constituting the record before us are any one of the above mentioned missing records. The omissions mentioned preclude us from an examination of the record, because they render it impossible to form an opinion as to the correctness of the judgment of the trial court.

Fidelity & Casualty Co. v. Field & Brown.

We recommend that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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THE FIDELITY & CASUALTY COMPANY OF NEW YORK V.  
FIELD & BROWN.

FILED FEBRUARY 6, 1902. No. 10,907.

Commissioner's opinion. Department No. 2.

**Principal and Agent:** RIGHTS OF THIRD PERSONS. The appointment of a "general agent" carries on its face general authority to act for and bind the principal in the line of the principal's business. Hence, as to persons who deal with such an agent in good faith without notice of the exact limits of his authority, the principal will be bound by his acts within the scope of his apparent authority.

ERROR from the district court for Lancaster county.  
Tried below before HASTINGS, J. *Affirmed.*

*J. R. Andrews and J. W. Deweese, for plaintiff in error.*

*C. O. Whedon, contra.*

POUND, C.

There is really but one question of law involved in this case, and that question, we think, under the facts found specially by the jury, amounts only to this: has a person who is admittedly the general agent of an insurance company, and is known to be such to the persons with whom he is dealing, power to bind the company by a contract employing attorneys to defend against a claim made upon the company, the employment of attorneys and counsel being in fact outside of the actual authority of such agent and a matter which the company reserves for itself? Where the persons with whom such contract is made are ignorant of this limitation, there can be but one answer to this proposition. The appointment of a



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“general agent” carries on its face general authority to act for and bind the principal in the line of the principal’s business. Hence, as to persons who deal with such an agent in good faith without notice of the exact limits of his authority, the principal will be bound by his acts within the scope of his apparent authority. *Brown v. Eno*, 48 Neb., 538; *Creighton v. Finlayson*, 46 Neb., 457; *Oberne v. Burke*, 30 Neb., 581; *Phoenix Insurance Co. v. Walter*, 51 Neb., 182. In the case at bar one Hurlbut, whom the company had insured against accident, had presented a claim for the alleged accidental shooting off of his foot. The general agent of the company, as the plaintiffs alleged and the jury found, entered into a contract with plaintiffs, a firm of attorneys at law, for defense against such claim. The plaintiffs knew he was a general agent and the jury found he did not inform plaintiffs of any limitations on his authority. As a matter of fact he seems not to have had the authority which the jury found he assumed. But he certainly appeared to have it from that which he actually had, and such is the legal test. *Oberne v. Burke*, 30 Neb., at page 592. Hence we are of the opinion that the instruction requested by the company was properly refused, as ignoring the question of ostensible authority, and that the instruction given by the trial court was right. The evidence as to whether there was a contract at all was conflicting. There was sufficient to go to the jury in support of plaintiffs’ case, and we can not say the findings are wrong. As to the errors assigned upon the admission of evidence of statements of one Zulich, an alleged representative of the company, we find that the court excluded most of what was offered on this head, and struck out the remainder. We see no error in the record and therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Axthelm v. Chicago, R. I. & P. R. Co.

AUGUST L. AXTHELM V. CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY.

FILED FEBRUARY 6, 1902. No. 10,918.

Commissioner's opinion. Department No. 1.

1. **Injunction: GATES ON RAILROAD RIGHT OF WAY: PLEADING.** A petition stating that a land owner without excuse persistently leaves open, as well as injures and destroys, gates on a railway company's right of way, at a farm crossing kept for defendant's access to his own premises, discloses a right to an injunction.
2. **Injunction: GATES ON RAILROAD RIGHT OF WAY: DEFENSE.** The fact that the gates were heavy and unsuitable would constitute no defense.
3. **Trial: FINDINGS OF LAW AND FACT: STATUTES.** A mere request for findings as to certain specified facts is not a request for separate findings of law and fact, under section 297 of the Code of Civil Procedure.
4. **Trial: RIGHT TO OPEN AND CLOSE.** Where judgment would go against plaintiff if no evidence were produced, it is not error to refuse defendant the right to open and close at hearing of case.
5. **Appeal and Error: IMMATERIALITY OF INSTRUCTIONS WHERE NO DAMAGE CAUSED.** Where the jury has specially found there was no damage caused, it is immaterial whether instructions as to a justification of the alleged injury are supported by the pleadings.
6. **Appeal and Error: OBJECTIONS TO INSTRUCTIONS AS A GROUP.** Objections to instructions as a group can not be sustained where any of them are properly given.

ERROR from the district court for Lancaster county.  
Tried below before TUTTLE, J. *Affirmed.*

*Willard E. Stewart*, for plaintiff in error.

*W. F. Evans, L. W. Billingsley and R. J. Greene*, contra.

HASTINGS, C.

In this case the railroad company, plaintiff below, commenced an action to enjoin the plaintiff in error, defendant below, from destroying, injuring and leaving open gates at a farm crossing over the company's track, near its station of Hallam, in Lancaster county. Axthelm

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answered the company's petition, admitting the erection of the crossing at his request, but complaining of it as inadequate, admitting the fencing of the right of way and the construction of the gates, but complaining that the fence was inadequate; complaining also that the gates were unfit, too heavy to be handled with reasonable convenience and defectively constructed, and that he had been compelled to repair and maintain the crossing at his own expense since its construction; denying generally plaintiff's other allegations. He also filed a cross-petition claiming damages in the sum of \$15 at one time and in the sum of \$10 at another time for hogs killed upon the track. He also alleged an agreement in consideration of certain services to keep an open crossing between his house and his barn with stock pens and feed lot on the opposite side of the track, and claimed damages in the sum of \$500 for failure so to do. He also claimed that the digging of a ditch late in 1894 or early in 1895 along the company's right of way, south of his farm, so diverted a large quantity of surface water from a ravine intersected by the ditch as to discharge the water upon defendant's farm, destroying his fences and damaging his meadow to the extent of 30 acres, and impairing the value of his farm and crops to the amount of \$1,500. Defendant also claimed that at the commencement of the action no gates were attempted or pretended to be maintained at the crossing; that during most of the time since the commencement of the operation of plaintiff's railway in 1893, its employees had used the gates and permitted them to remain open; that in 1897, the gates were removed and thrown away, and the passage closed by a stationary five wire fence, and about January 3, 1898, the gates were replaced and firmly fastened by nails to posts, and about January 10, the gates were torn down and thrown upon the ground and so remained with the opening unobstructed to the beginning of this action. Defendant also alleged that at the time of the commencement of the action, the company's fences for several miles

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on each side of the crossing in question were out of repair and entirely insufficient, and that the opening at the said crossing could not possibly produce any of the results claimed in the petition. The defendant asked that the restraining order be dissolved and the injunction denied, that the plaintiff be compelled to perform its contract as to the maintenance of the open crossing, and that the defendant might recover \$2,025 and costs of suit. Specific denials were filed to the affirmative allegations by way of answer and to the cross-petition.

A restraining order was allowed by the court, pending the action, preventing the defendant, his servants and employees, from leaving the gates open or from breaking down, destroying or in any way injuring them. After the issues were joined a jury was demanded by the defendant, which was allowed over the company's objection. At the trial evidence relating to all the issues was submitted together, and a general verdict for the defendant assessing his damages at \$27.50 was found by the jury, together with a large number of special findings: 1, that the railway company collected surface water into a ditch along its right of way and discharged it upon Axthelm's premises; 2, that the surface water would not have flowed on defendant's farm except for the ditch; 3, that defendant's farm and property were not damaged by the water; 4, that the hogs were killed on the company's right of way by collision with trains; 5, that the company's fence along its right of way was not sufficient to prevent cattle, horses, sheep and hogs from getting on the railroad; 6, that the value of the hogs killed was \$25; 7, that the ditch and culvert complained of were made within four years before the commencement of the action; 8, that the ditch and culvert were properly constructed, and 9, that the defendant never made any demands for the payment for his hogs killed. Motion for a new trial was overruled and judgment was entered on the verdict for \$27.50 and costs in favor of defendant. The court found in favor of plaintiff as to defendant's demand for an open cross-

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ing, and in favor of plaintiff on its petition for an injunction, and made the injunction perpetual, and taxed the costs of that branch of the case to defendant. A motion was made to set aside the findings and judgment of the court on the injunction branch of the case, which was overruled.

Error is urged on the grounds: 1, that plaintiff's petition discloses no cause of action; 2, that the court, though specially requested so to do, made no separate findings of law and fact as required by section 297 of the Code of Civil Procedure; 3, that the evidence showed that the gates repaired by the company and which the defendant was required to keep closed, were unfit and unsuitable and not such as the statute requires; 4, that the defendant was improperly denied the right to open and close; 5, that instructions Nos. 8 and 9, telling the jury that the company had a right to repel surface water from its premises and that it had a right to construct its railroad through the premises, and if damages were caused merely by an effort to repel surface water or by construction of the railroad through the premises with due care there could be no recovery, were not within the issues as not being pleaded; 6, that instruction No. 14, that a view of the premises by the jury was not to furnish evidence of damages or to make the jurors witnesses concerning damages, but solely that they might better understand the testimony, and that they must consider the view of the premises in no other light and for no other purpose. The errors particularly urged at the hearing are the alleged refusal to make separate findings of law and fact; the denial of the right to open and close, and the giving of instructions Nos. 8, 9 and 14.

The petition seems sufficient to authorize the interposition of an injunction, if its allegations are taken as true. It is the right of the railway company to maintain its fences. It need not wait until it has suffered great injury before attempting to vindicate its right. It is held in *Trusdale v. Jensen*, 59 N. W. Rep. [Ia.], 47, that it is

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sufficient that it is charged that defendant persists in leaving the gates open. The company and defendant are joint occupiers of the premises and jointly in charge of the gates and the use of the writ of injunction to prevent a wrongful use by the defendant in view of the important interests concerned seems eminently proper. The claim of error in this particular can not be sustained.

The second claim that there was error in the court's failing to separately state its conclusions of fact and its conclusions of law can not be sustained. The court was not asked to do so. It was asked merely to find separately as to certain matters of fact, some of which at least were not essential to a determination of the injunction branch of the case. It was discretionary in the court to pass upon these specifically or not, and error could not be predicated upon its refusal, except by a showing of prejudice. This does not appear. No request for separate findings under section 297 of the Code of Civil Procedure was made.

As to the third point, that the evidence shows unsuitable gates, it is to be said that this would not warrant the leaving of them persistently open, nor prevent an injunction against so doing. The evidence on this point, if as conclusive as defendant claims, would not warrant his taking the remedy into his own hands.

It is confidently claimed that the privilege of opening and closing was wrongfully denied to the defendant in the hearing before the jury. It appears that when the case was called for hearing after the jury was impaneled, the right to open and close to the jury was claimed by defendant. Plaintiff then offered, if its right to the relief sought was admitted without evidence, to allow this. Defendant's counsel was asked by the court if this was admitted on the face of the pleadings and replied that it was not, and his request was then refused. The entire evidence was then taken in the presence of the jury. This would seem to have been done in accordance with the statute which provides that the party against whom judg-

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ment will be entered, if no evidence is introduced, shall have the privilege of opening and closing. It is true that subsequently the court withdrew from the consideration of the jury the equity side of the case. It is also true that the defendant objected to the introduction before the jury of any evidence as to the equity part of it. This objection at the time was overruled. Apparently the court had not determined until the evidence was in to take this action. The transfer to the law side of the court and calling of the jury was at defendant's request over plaintiff's objection. The reference of the equity questions to the jury or not was in the discretion of the court. There was no violation of law, and apparently no injurious exercise of discretion by the court, and the claim of error in this part of the conduct of the trial must be denied.

The claim of error in giving instructions can not be considered. In both the motion for new trial and the petition in error, the entire body of instructions, fifteen in number, are grouped in one complaint of error in giving all of them. No error is now claimed in any but the 8th, 9th, and 14th. It has been often enough held that an assignment of error in giving a group of instructions is insufficient, if any of them was properly given. *Union Pacific R. Co. v. Montgomery*, 49 Neb., 429; *Kaufmann v. Cooper*, 46 Neb., 644; *McCormal v. Redden*, 46 Neb., 776. The complaint as to instructions Nos. 8 and 9 could hardly be well founded in any event. The jury specially found that no damage was done to defendant by the surface water. The matters of justification submitted therefore became immaterial. It does not matter whether they were pleaded or not. As to No. 14, it is claimed by the plaintiff company that there was no evidence tending to sustain the claim for damages from water, the only one submitted to the jury as to which the view could be material; defendant's claim for his hogs being allowed in full. Of course, if such were the case defendant could not complain that the jury were told that their own



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examination was no part of the evidence and was only to be considered as helping them to understand and weigh evidence. But in any event, as above indicated, the objection to this instruction is not made, and can not be considered by itself.

It is therefore recommended that the judgment and decree of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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HENRY S. REED V. CHESTER A. MOTT.

FILED FEBRUARY 6, 1902. No. 10,931.

Commissioner's opinion. Department No. 2.

1. **Justice of the Peace: JURISDICTION: VOLUNTARY APPEARANCE: CONTINUANCE.** The return day of the summons was September 5. It was returned not served because the defendant was a non-resident of the state, and not found within the county. On October 16, defendant entered his voluntary appearance in the case, waiving issuance and service of summons. *Held*, That the date of such appearance was equivalent to the return day of the summons; that a continuance for less than ninety days from October 16 but more than ninety days from September 5, without defendant's consent, did not work a discontinuance of the suit.
2. **Judgment: CONSENT OF PARTIES AS TO TIME OF RENDERING: STATUTES.** A suit, in which there were attachment and garnishment proceedings, was tried to the court without the intervention of a jury. The parties being present at the conclusion of the argument and at the time of the final submission of the case, consented and agreed, upon the request of the justice, that he should take the case under advisement and render his judgment within four days as defined in the statute. On the third day thereafter, both parties being in court, judgment was rendered. *Held*, That the justice need not, in such case, render his judgment instantly; and that if the judgment was rendered within the time agreed upon by the parties, and defined in section 1002 of the Code, such judgment was not void for want of jurisdiction.
3. **Appeal and Error: CONFLICTING EVIDENCE.** Where there is a conflict of evidence on the matters in dispute between the parties, the verdict of a jury based thereon will not be disturbed.

ERROR from the district court for Lancaster county.  
Tried below before TUTTLE, J. *Affirmed.*



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*John S. Bishop*, for plaintiff in error.*Frank H. Woods, contra.*

BARNES, C.

The defendant in error, the plaintiff in the court below, filed a bill of particulars against the defendant, hereafter to be called the plaintiff, in the justice court of Lancaster county, before Justice L. A. McCandless, on the 31st day of August, 1896, demanding judgment against the plaintiff for \$74.15 for services rendered and money expended for and at the request of the plaintiff. At the same time an affidavit was filed for attachment and garnishment, the grounds of the affidavit being that the plaintiff herein was a non-resident of the state. The summons and order of attachment were returnable on the 5th day of September, following. The officer, in whose hands they were placed, levied the attachment upon certain personal property belonging to the plaintiff and gave notice of garnishment to one William H. Ashworth. The summons was returned not served because the plaintiff could not be found in Lancaster county. On September 9, 1896, at 9 o'clock a. m. the garnishee appeared and answered, and was ordered to hold the money in his hands belonging to the plaintiff, until the further order of the court. No further attempt was made to get service of summons upon the plaintiff; but on the 19th day of October, 1896, he entered his voluntary appearance in the suit, waiving issuance and service of summons, and agreed that the case should be continued to November 16, 1896. On November 16 the parties appeared at 9 o'clock a. m. and the defendant (plaintiff herein) filed a motion and affidavit for a change of venue, which was granted, and it was ordered that the place of trial be changed to the justice court of Walter A. Leese, he being the nearest justice, and of course the one to whom the case should go. The cause was set for trial, by agreement, November 18, 1896, at 9 o'clock a. m. On November 18 both parties

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appeared in court and the transcript not being ready the cause was continued, by agreement of the parties, to be taken up at their convenience in the justice court of Walter A. Leese. The transcript was not made until January 8, 1897; but on January 9 it was filed with Justice Walter A. Leese, and he being engaged in other official business ordered that the trial of the case be continued until Monday, January 11, 1897, at 10 o'clock a. m., and the parties, by their counsel were notified of such fact. On January 11, at 10 o'clock a. m., the case was called for trial, and both parties appeared. The defendant (plaintiff herein), however, appeared especially, and objected to the jurisdiction of the court because the case had been continued, as set forth in his objection, for more than ninety days from the return day of the summons without his consent. His objection to the jurisdiction was argued, and the justice overruled the same. Plaintiff saved an exception to the ruling of the justice, and afterwards appeared generally in the case, by filing a motion to require the defendant herein to amend his bill of particulars. The bill of particulars was amended, and the plaintiff then filed his answer in the nature of a denial and counter-claim. The plaintiff then moved the court to require the defendant herein to produce in court, or give him an inspection and permission to take a copy of, all the letters which the plaintiff had written to the defendant during the years 1894, 1895 and 1896. The court granted the order, and the defendant complied therewith and produced the letters. On the 18th day of January, 1897, both parties appeared and the defendant filed a second amended bill of particulars, and by consent and agreement of parties the cause was continued to the 23d day of February, 1897, at 9 o'clock a. m. On February 15, there were received and filed by the justice certain depositions taken on behalf of the plaintiff herein, and on February 23, 1897, at 9 o'clock a. m., the case was called and the parties appeared for trial. The court was engaged in other official business and the case was

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adjourned, by the court, to 10 o'clock a. m. of the same day. At 10 o'clock a jury was waived by the parties and the trial commenced. Before it was finished, however, by agreement it was ordered that the trial should be adjourned and continued to February 27, 1897, at one o'clock p. m. On February 27, the case was called, both parties appeared and the trial was resumed. After taking the evidence of some of the witnesses, by consent of the parties, the case was again continued to March 9, 1897, at 2 o'clock p. m. On March 9 the parties appeared and the trial was resumed; before the trial was concluded, however, the plaintiff (defendant below) amended his bill of particulars. The case was thereupon argued by counsel, and by consent of both parties was adjourned or continued to March 13, 1897. On March 13 the case was called and the parties again agreed to a continuance of the case to the 23d day of March, 1897. On the 23d day of March the parties both appeared, and by agreement the case was continued indefinitely to be taken up and argued upon agreement and at the convenience of counsel. On July 21, 1897, at 3:30 p. m., both parties appeared in court and consented that the case should then be taken up and argued and finally submitted to the court. The case was thereupon submitted to the court upon the argument of counsel and the evidence, and upon the request of the court and the consent of both parties, made in open court, was taken under advisement for a period of not to exceed four days. On July 24, 1897, at 3:30 p. m., the parties appeared in court and thereupon the justice rendered his decision, finding in favor of the defendant in error and against the plaintiff herein for \$67.15 debt and \$1.70 interest, making the sum total of \$68.85. The court also found against the plaintiff on his counter-claim and set-off. The court further sustained the attachment and garnishment and rendered judgment accordingly. Thereupon, on July 31, the plaintiff filed an appeal undertaking with the justice, which was duly approved. He also filed a redelivery bond, and

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obtained possession of the attached property and the money which had been paid into the court by the garnishee. He prosecuted his appeal in due time to the district court for Lancaster county, where a trial was had. In the district court plaintiff herein, in addition to the defenses which he had pleaded in his answer in the court below, set forth three separate paragraphs, in each of which he challenged the jurisdiction of the district court to try and determine the issues in the case. The defendant, by his reply, denied this new matter in the answer attacking the jurisdiction of the court. A trial was had to a jury, and a verdict was returned against the plaintiff for the sum of \$76.30. The jury also found against him upon his counter-claim. He filed a motion for a new trial, which was overruled; judgment was rendered against him on the verdict, and he brings the case to this court for review upon a petition in error. The foregoing facts are all shown by the transcript of the justice's docket, which was introduced in evidence on the trial in the district court by the plaintiff, and are not disputed by him. In his petition plaintiff assigns twenty-two grounds of error, but in his brief and on the argument, but two propositions are seriously urged. The first is, that the justice court had no jurisdiction to render the judgment it did against him; that it had lost jurisdiction, first by a continuance of more than ninety days from the return day of the summons, without his consent; and second, that the justice, upon the final submission of the case to him on July 21, 1897, did not render judgment immediately, and thus lost jurisdiction to pronounce any judgment therein; third, that the verdict is not sustained by the evidence. Other assignments of error were discussed briefly, and they will receive attention in this opinion.

1. The contention of the plaintiff that the justice lost jurisdiction of the case because it was continued for more than ninety days from the return day of the summons without his consent, is not good. The justice of the peace, by law, had jurisdiction of the subject-matters in litigation

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in this case. Whenever the court obtained jurisdiction of the person of the defendant it then had full power to try and adjudicate all the questions in dispute between the parties. Jurisdiction of the person of the plaintiff was not obtained by the issuance and service of a summons. The only summons issued in the case was returned not served, because of the non-residence of the plaintiff. Therefore, neither the summons nor the return day mentioned in it can be considered in determining the questions involved herein. On the 19th day of October, 1896, the plaintiff entered his voluntary appearance in the case, and waived the issuance and service of a summons. The return day of a summons, issued by a justice of the peace, is the day and the hour when the defendant is required to enter his appearance in the case. It stands to reason, then, that when the plaintiff entered his voluntary appearance, such action on his part was equivalent to his appearance in court in response to a summons, duly served upon him, on the return day thereof. The record in this case shows that the case was thereupon continued by consent of both parties until the 16th day of November. On that day the plaintiff filed his application for a change of venue. On the 18th day of November the parties appeared in court and the transcript not being ready it was agreed that the matter should be left to be taken up later in the justice court of Walter A. Leese, to which the change of place of trial had been ordered. For some reason, not disclosed in the record, the transcript was not filed in the justice court of Walter A. Leese, until the 9th day of January following. If such continuance so made necessary by reason of the delay in preparing and filing the transcript, was without consent, the time of the same was only fifty-three days. Therefore the order of the justice overruling the objection to his jurisdiction was right. It is immaterial, however, in our view of the matter, because the plaintiff, immediately thereafter, filed a motion requiring the defendant to make his bill of particulars more definite and certain. He also subse-

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quently agreed to all of the continuances had in the case, and voluntarily took part in all of the proceedings up to the time of the final judgment. By so doing he waived the error, if any, committed by the justice in overruling his objection to the jurisdiction of the court.

2. The second contention of the plaintiff presents a much nicer question. Section 1002 of the Code provides: "Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached; in other cases it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive." In view of this section of the statutes, if this matter had never been before this court, we would be inclined to hold that when the justice took this case under advisement at the conclusion of the argument, and when it was submitted to him finally on the 21st day of July, and he retained it until the 24th without rendering his judgment until that day, he lost jurisdiction of the case. However, a similar question was before this court in the case of *Huff v. Babbott*, 14 Neb., 150. In that case the trial was had on the 28th day of September, 1881, to the court, a jury having been waived, and was taken under advisement to the 29th day of September, 1881. On the 29th the justice rendered his judgment. Error was prosecuted to the district court where the judgment of the justice was reversed for want of jurisdiction, from which judgment error was prosecuted to this court, where the judgment of the district court was reversed and that of the justice reinstated. In that case there had been an attachment issued and levied upon the property of the defendant, and Justice MAXWELL, speaking for the court, said: "The statute, if construed literally, would require the justice to render a judgment instantly on the conclusion of the trial. It will not be contended that the legislature intended such a narrow construction to be

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given to the statute. It is to be construed in a reasonable manner that the justice is to render judgment in a short time and before taking up new business.

"The object of the statute doubtless is to enable a party who has been unlawfully restrained of his liberty to be discharged at the earliest practicable moment, in case no cause of action is proved against him. So if his property is taken from him on an order of attachment and the proof fails to show a cause of action the property shall be discharged. But the justice may require time to consider the evidence before rendering a judgment, and it may be necessary for him to do so before he is prepared to decide. If a decision is rendered before the justice has time to consider the evidence there is great danger of his committing an error which more mature reflection would have enabled him to avoid. We therefore are not disposed to place so narrow a construction on the word 'immediately' as to hold that a delay of a few hours in rendering judgment is not in compliance with the statute. Had the evidence been introduced on the 28th and the case continued until the next morning for the purpose of hearing the argument of the parties or their attorneys in the case, no one would contend that a decision must be made before the conclusion of the argument, yet the argument is merely for the purpose of aiding the court in reaching a correct conclusion.

"It is well to require justices to perform their duties in the mode and within the time required by the statute; but their proceedings must be construed in a reasonable manner and in such a way as will enable them to administer justice. It is pretty clear that a correct decision was made by the justice in this case, and this court will not reverse it for an alleged error which at most is but technical."

• In the case of *Austin v. Brock*, 16 Neb., 642, Chief Justice COBB referred to the opinion of Judge MAXWELL in *Huff v. Babbott*, *supra*, quoted extensively therefrom, and then said: "I accept the reasoning, as well as the au-



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thority, of this case and if the case at bar falls within the former, the judgment must be affirmed." In addition to this it must be remembered that the plaintiff was present in court, consenting to and agreeing that Justice Leese should have time to consider the evidence and the arguments made in the case; and that the case might be taken under advisement for a period not exceeding four days. The judgment having been rendered within the time thus agreed upon it cannot be urged by the plaintiff, after thus consenting thereto, that the court had no jurisdiction of the case. For these reasons the instruction, that the question of jurisdiction was a matter of law for the court, and that the jury should not consider the same, was proper; and in refusing to instruct the jury to return a verdict for the plaintiff the court did not err. It is contended that the court erred in not striking out the defendant's reply to the new matters relating to the jurisdiction set forth in the plaintiff's answer in the district court. We have examined the record and believe that it was proper for the defendant to file a reply to the paragraphs in the answer pleading want of jurisdiction, to state the real facts as they existed, and deny the allegations of such pleading. An issue was thus raised, and to determine it the plaintiff, himself, introduced the transcript of the docket of the justice of the peace, which showed the facts above set forth, and upon which the court held that the question of jurisdiction was a matter of law and not of fact.

3. The only other assignment of error relied on by the plaintiff, is the one that the verdict is not sustained by the evidence. An examination of the record shows that there was some competent and material evidence tending to establish each and all of the items set forth in the defendant's petition in the court below; that there was a conflict of evidence upon some of these matters, and there was also a conflict of evidence upon the matters set forth in the counter-claim of the plaintiff. The record shows that the issues were fairly tried and properly submitted,



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and the jury having determined these questions upon such conflicting evidence this court is not warranted in disturbing the verdict.

For the foregoing reasons, we believe the judgment of the district court should be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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DARTMOUTH SAVINGS BANK, APPELLEE, v. TIMOTHY FOLEY,  
APPELLANT, ET AL.

FILED FEBRUARY 6, 1902. No. 10,973.

Commissioner's opinion. Department No. 1.

**Mortgage Foreclosure:** OBJECTIONS TO APPRAISAL. Objections to the appraisement of real estate for the purpose of judicial sale examined and *held*, under the record, not well founded.

APPEAL from the district court for Douglas county.  
Tried below before SCOTT, J. *Affirmed*.

*J. J. O'Connor*, for appellant.

*Geo. E. Turkington*, contra.

DAY, C.

This is an appeal from an order confirming the sale of certain real estate, made in pursuance of a decree of foreclosure entered by the district court for Douglas county. The appellant filed objections to the appraisement based upon a number of grounds but in the brief relies upon the 3d and 4th objections for a reversal of the case. These are as follows: "3d. That there are liens deducted from the value as appears by the appraisement that were not valid liens on said real estate," and "4th. For other errors that appear on the face of the record." No objections were made to the sale itself, but the objections to the appraisement were overruled at the time of the confirmation and exceptions taken.

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The third objection has nothing whatever to support it, the only liens deducted were for taxes in accordance with the treasurer's certificate. There is nothing to show that the treasurer's statement is erroneous. But even if taxes were deducted which were erroneous, the appellant is not in position to complain because the return to the order of sale shows that the premises were sold for more than the gross appraisement. Granting that it was error to deduct the taxes from the appraisement, the appellant has not been in any manner prejudiced by it.

The fourth objection as against the appraisement is too general to be considered. No substantial objection has been pointed out and an examination of the sheriff's proceedings in making the appraisement discloses nothing which seems to justify the complaint concerning it. There being no specific objections to the sale and only these two directed against the appraisement, which we consider without merit, we recommend that the decree of confirmation be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION OF  
GENEVA, NEW YORK, APPELLANT, V. MARION S. PAL-  
MER ET AL, APPELLEES.

FILED FEBRUARY 6, 1902. No. 10,981.

Commissioner's opinion. Department No. 2.

1. **Building and Loan Associations.** *People's Building, Loan & Savings Association v. Backus*, post, page 463, followed in a case of the same nature.
2. **Usury: WHO MAY PLEAD, AS A DEFENSE.** Usury is a defense personal to the borrower which may not be asserted by a purchaser of mortgaged premises who has assumed the mortgage.
3. **Usury: MORTGAGE FORECLOSURE: BORROWER MAY PLEAD USURY.** But if the borrower and mortgagor has retained any interest in the mortgaged premises, or any personal liability is sought to be en-

People's Building, Loan & Savings Ass'n v. Palmer.

forced against him, he may set up usury and pray for cancellation in a suit to foreclose the mortgage, although a purchaser of the mortgaged premises joined with him as a defendant, and joining in the answer, might not do so.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

*Hurd & Spanoglè* and *O. M. Elliott*, for appellant.

*Thomas H. Matters*, contra.

POUND, C.

Except in one particular, this cause is of the same nature as *People's Building, Loan & Savings Association v. Backus*, post, page 463, and should be disposed of in the same way. The one point of difference is that, in addition to the mortgagors, two other defendants are joined who are alleged upon information and belief to be purchasers of the mortgaged premises and to have assumed and agreed to pay the mortgage. But there is an express allegation that one of the mortgagors claims some interest in the property, and a prayer that each be foreclosed of any interest therein. It is also alleged that a considerable sum of money is due from the borrower personally, and general relief is prayed against him as well as the other defendants. All the defendants joined in an answer and cross-petition alleging usury and payment of the sums legally due on the loan, and prayed for cancellation. A reply having been filed admitting the substance of the facts alleged, the court rendered a decree for defendants on the pleadings. This decree is complained of for the reason that the purchasers who had assumed the mortgage could not be heard to set up the defense of usury, which was personal to the borrower and to be made by the latter only. It is undoubtedly true as a general proposition that a purchaser of mortgaged premises who has assumed a mortgage tainted with usury cannot plead usury as a defense against the mortgage for the reason that the defense belongs to the parties to the original

*People's Building, Loan & Savings Ass'n v. Welton.*

transaction and is for them only. *Building & Loan Association of Dakota v. Walker*, 59 Neb., 456. But here the borrower was making the defense and was in a situation requiring him to make it to avoid liabilities asserted against him and his interests. So long as he retained any interest in the mortgaged premises or any personal liability was asserted against him by reason of the loan, he was entitled to set up usury, insist that the loan was paid, and pray for cancellation. We therefore recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION OF  
GENEVA, NEW YORK, APPELLANT, V. ANGELINE M.  
WELTON ET AL., APPELLEES.

FILED FEBRUARY 6, 1902. No. 10,982.

Commissioner's opinion. Department No. 2.

**Building and Loan Associations: USURY: MORTGAGE FORECLOSURE.**  
*People's Building, Loan & Savings Association v. Palmer, ante*,  
page 460, followed in a case of the same nature.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

*Hurd & Spanogle*, for appellant.

*Thomas H. Matters*, contra.

POUND, C.

This case is in all essential respects the same as *People's Building, Loan & Savings Association v. Palmer, ante*, page 460. It is possibly a clearer case in that the petition contains an allegation that the borrowers have an interest in the property (not merely that an interest is claimed) and an express prayer for deficiency judgment against them. For the reasons assigned in the

*People's Building, Loan & Savings Ass'n v. Backus.*

opinions in *People's Building, Loan & Savings Association v. Backus*, next following, and *People's Building, Loan & Savings Association v. Palmer*, ante, page 460, we recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

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PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION OF  
GENEVA, NEW YORK, APPELLANT, V. LEWIS S. BACKUS  
ET AL., APPELLEES.

FILED FEBRUARY 6, 1902. No. 10,983.

Commissioner's opinion. Department No. 2.

1. **Evidence:** JUDICIAL NOTICE OF LAWS OF OTHER STATES: PRESUMPTIONS. This court will not take judicial notice of the laws of other states, but, in the absence of pleading and proof as to such laws, will presume them to be the same as our own.
2. **Usury:** PENALTY: PRESUMPTIONS. As the statutes of this state do not provide for forfeiture of the whole loan or avoidance of the whole contract in case of usury, or impose other penalty, but merely limit recovery to the sum actually loaned, such presumption obtains equally in cases where usury is pleaded.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

*Hurd & Spanogle and C. M. Elliott*, for appellant.

*Thomas H. Matters*, contra.

POUND, C.

This suit was brought to foreclose a mortgage executed by Backus and his wife to appellant to secure a loan of money. The defendants pleaded usury. The reply admits the essential facts set up in the answer but alleges that the moneys secured were payable in the state of New York and that the transaction was made with reference to and intended to be governed by the laws of that state. The district court rendered a decree for defendants

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upon the pleadings. We are much inclined to think that the decision in the case of *Building & Loan Association of Dakota v. Bilan*, 59 Neb., 458, ought not to be extended beyond the state of facts there involved, and that in a proper case, in the light of *Bedford v. Eastern Building & Loan Association*, 181 U. S., 227, 88 Fed. Rep., 7; *Bennett v. Eastern Building & Loan Association*, 177 Pa. St., 233, 35 Atl. Rep., 684, and *Nickels v. People's Building, Loan & Savings Association*, 93 Va., 380, 25 S. E. Rep., 8, the general question as to the law governing such contracts ought to be reconsidered. But under the pleadings in this case we are clear that the decree should be affirmed. This court does not take judicial notice of the statutes of the state of New York. The laws of that state are not pleaded, and even if we concede that the transaction in controversy is to be governed thereby, the result would be the same, since, in the absence of some showing as to the New York law in the record, we will presume it to be the same as our own. *Welton v. Atkinson*, 55 Neb., 674. This presumption obtains also in cases where usury is alleged. In such cases, in the absence of pleading and proof of the foreign law, the question will be determined according to the law of the forum. *Craven v. Bates*, 96 Ga., 78, 23 S. E. Rep., 202; Webb, Usury, section 280. It is true there is no such presumption where the local statute prescribes penalties and forfeitures. *Balfour v. Davis*, 14 Ore., 47, 12 Pac. Rep., 89. But our statute is not of that character. It does not avoid the whole contract in case of usury, but only limits recovery to the sum actually loaned. Hence there is no reason for refusing to presume it to represent the law in force elsewhere. *Hubbell v. Morristown Land Co.*, 95 Tenn., 585, 32 S. W. Rep., 965. Judged by the laws of this state, the loan was undoubtedly usurious. *Building & Loan Association of Dakota v. Bilan*, 59 Neb., 458; *Interstate Savings & Loan Association v. Strine*, 58 Neb., 133. Hence, whatever view we might take as to the law by which the case is to be determined, the decree must stand.

People's Building, Loan & Savings Ass'n v. Carricker.

We therefore recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

OLDHAM, C., concurring.

I concur in the opinion reached by my brother POUND that this case should be affirmed. But on the question as to whether this contract should be construed by the laws of the state of New York or the laws of the state of Nebraska in determining the defense of usury interposed I adhere firmly to the views I recently expressed in the similar case of *People's Building, Loan & Savings Association v. Shaffer*, 63 Neb., 573.

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PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION OF GENEVA, NEW YORK, APPELLANT, V. WILLIAM L. CARRICKER ET AL., APPELLEES.

FILED FEBRUARY 6, 1902. No. 10,984.

Commissioner's opinion. Department No. 2.

Building and Loan Associations: EVIDENCE: USURY. *People's Building, Loan & Savings Association v. Backus*, ante, page 463, followed in a case of the same nature.

APPEAL from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed*.

*Leslie G. Hurd*, for appellant.

*Thomas H. Matters*, contra.

POUND, C.

This case is of the same nature and involves the same questions in all respects as *People's Building, Loan & Savings Association v. Backus*, ante, page 463, decided at this sitting. For reasons assigned in the opinion in that case, it is recommended that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

Owens v. City of South Omaha.

JOHN O. OWENS ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., IMPEADED WITH JOHN M. SHANAHAN, ADMINISTRATOR OF THE ESTATE OF CATHERINE DRISCOLL, DECEASED, APPELLANT.

JOHN M. SHANAHAN, ADMINISTRATOR OF THE ESTATE OF CATHERINE DRISCOLL, DECEASED, V. CITY OF SOUTH OMAHA ET AL.

FILED FEBRUARY 6, 1902. Nos. 10,988, 10,989.

Commissioner's opinion. Department No. 3.

1. **Judgment in Action Upon a Judgment: COLLATERAL ATTACK OF FIRST JUDGMENT FOR FRAUD.** A judgment recovered in an action upon a judgment, can not be collaterally assailed upon the ground that the last mentioned judgment was fraudulently obtained.
2. **Judgment Against Municipal Corporation: CONCLUSIVENESS.** A judgment against a municipal corporation is equally conclusive upon the city and its taxpayers.

APPEAL from the district court for Douglas county. Tried below before DICKINSON, J. *10,988 Reversed and dismissed. 10,989 Reversed with directions.*

*T. J. Mahoney and J. A. C. Kennedy*, for appellant and plaintiff in error.

*R. B. Montgomery, contra.*

AMES, C.

These causes were submitted together upon oral argument and brief, on behalf of the appellant and plaintiff in error, Shanahan, alone, the city of South Omaha and Owens being in default in this court. In accordance with a rule heretofore announced by this court, the facts disclosed by the record will be taken to be such as they are represented to be by the brief. Their statement is somewhat voluminous, but it cannot be considerably abridged without sacrifice of necessary clearness in the presentation of the questions of law involved. The two cases were



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tried together in the court below and both disposed of on the same evidence. The bills of exceptions are exact duplicates and the questions involved in both cases are identical, and for these reasons both will be disposed of as one and in a single opinion.

The petition in case No. 10,989 in the lower court was for a writ of mandamus to compel the levy of a tax by the city of South Omaha upon the taxable property within that city and the issuance of warrants for the payment of a certain judgment rendered in the district court for Douglas county on the 11th day of April, 1896, in favor of one Catherine Driscoll and against said city for the sum of \$2,500 and costs. The petition in case No. 10,988, in which John O. Owens and others appear as plaintiffs and appellees, is a petition filed by certain alleged taxpayers to enjoin the levy of the tax, the issuance of warrants and the payment of the same judgment.

The pleadings and records in both cases show that prior to the 11th day of April, 1896, there was pending in the district court for Douglas county an action by Catherine Driscoll against the city of South Omaha to recover some \$3,000 damages on account of a personal injury alleged to have been sustained by the reason of the negligence of the city. That on said 11th day of April, 1896, the defendant in said action, the city of South Omaha, by an attorney specially employed by the mayor and city council, and specially authorized by a resolution adopted by the mayor and city council, confessed judgment in said action in favor of the plaintiff therein, Catherine Driscoll, in the sum of \$2,500, which confession of judgment was accepted by the plaintiff. That in a very short time after the rendition of said judgment there was filed in said cause an assignment of said judgment from Catherine Driscoll to one Mary G. Madden. That shortly after Catherine Driscoll died intestate and that John M. Shanahan was appointed administrator of the estate of Catherine Driscoll, deceased, and duly qualified as such administrator, and entered upon the duties of his office.

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That after the appointment of said Shanahan as such administrator he commenced a suit in equity in the district court for Douglas county in his capacity as administrator of the estate of Catherine Driscoll, deceased, in which suit he made the city of South Omaha and Mary G. Madden parties defendant, and in which suit he alleged that the assignment of the judgment against the city of South Omaha from Catherine Driscoll to Mary G. Madden had been obtained by fraud practiced upon said Catherine Driscoll by her attorney in collusion with said Mary G. Madden, and in which suit he prayed that said assignment should be set aside and cancelled and held for naught; that the city should be enjoined from paying said judgment to said Mary G. Madden, but should be adjudged and decreed to pay the full amount of said judgment to said Shanahan, administrator. In this suit service was duly made upon the city of South Omaha and Mary G. Madden. The suit was commenced by the filing of the petition therein on the 8th day of October, A. D. 1896. On the 19th day of October, 1896, summons was returned showing service upon the city of South Omaha by service upon its mayor made on the 15th day of October, 1896, and also personal service upon Mary G. Madden on the same date; that suit remained pending until the 28th day of October, 1897, when a decree was rendered by the district court adjudging and decreeing that the city of South Omaha should pay to the plaintiff in said cause, John M. Shanahan, in his capacity as administrator, one-half of the full amount of the aforesaid judgment in the case of Catherine Driscoll against the city of South Omaha, together with interest thereon. In this equity suit the city of South Omaha made no appearance whatever, although the case was pending upon the docket of the district court for more than a year after service was made upon the city. Mary G. Madden appeared and filed an answer reciting that on or about the first day of June, 1896, she had sold all her right, title and interest in the judgment to Thomas Hactor. Thomas Hactor appeared and was allowed to be

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substituted as party defendant in lieu of Mary G. Madden. He alleged the purchase of the judgment from Mary G. Madden, denied all the plaintiff's allegations of fraud in respect to the obtaining of the assignment from Catherine Driscoll, and prayed for a dismissal of plaintiff's petition and for general equitable relief. After the case had been pending for more than a year, and while the city had wholly failed to make any appearance therein, the plaintiff, Shanahan, administrator, and the defendant, Hctor, by a stipulation settled the controversy as between themselves and agreed that each party should take one-half of the judgment. After this agreement the court entered a default against the city and rendered its decree adjudging among other things as above stated that the city should pay the plaintiff one-half of the full amount of the judgment, together with interest, and the other half to the defendant, Thomas Hctor. From this decree no appeal was ever taken and no proceedings were brought to vacate it or to attack it in any direct form. Afterwards, and before the making of the regular levy of taxes for the year 1898, Shanahan, administrator, and Hctor, in his individual character, made demand upon the city and its officials to levy the tax necessary to pay the judgment and to issue warrants to said Shanahan for one-half thereof and to pay the same. This demand the city authorities failed to comply with and thereafter, on the 27th of February, 1899, Shanahan, administrator, commenced in the district court of Douglas county the mandamus proceeding, the record of which is now before this court as case No. 10,989, in which proceeding he pleaded that the city of South Omaha then and at all of the times named in said petition had been a city of the first class, having between 10,000 and 25,000 inhabitants. He also pleaded the official capacity of the Mayor and various members of the city council and the city clerk; rendition of the judgment in favor of Catherine Driscoll on the 10th day of April, 1896, for \$2,500; the filing of the assignment of the judgment to Mary G. Madden; the

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bringing and prosecuting to final decree the equity suit against the city of South Omaha and Mary G. Madden, and the intervention therein of Thomas Hoctor, and the entry of the decree in said suit adjudging said Shanahan in his capacity as administrator to be the owner of and entitled to collect one-half of the said judgment; that said decree remains wholly unappealed from and unmodified and that the same is conclusive upon the city of South Omaha, and upon said Thomas Hoctor, and the making of demand upon the city and its mayor and council, for the levy of a tax and the issuance of warrants to pay the said judgment in accordance with the terms of said decree. The petition prayed for the issuance of a writ of mandamus compelling the levy of said tax, the issuance of warrants and the payment of said judgment according to the terms of the decree in the equity case. Upon this petition being filed an alternative writ issued commanding the said officials by name and in their official capacity to provide for the said judgment or to show cause, if any there be, why a peremptory writ of mandamus should not issue. The city officials appeared and filed an answer in the mandamus proceeding in which they admitted the corporate character of the city and the official capacities of the various defendants, the rendition of the judgment in favor of Catherine Driscoll on the 10th of April, 1896, and the assignment of said judgment to Mary G. Madden. They also admitted the rendition of the decree in favor of Shanahan, administrator, in the equity suit brought by him to set aside the assignment and compel payment to himself, and admitted that said decree is in full force, unappealed from and unmodified, but denied that it is binding upon the city on the grounds that the original judgment against the city in favor of Catherine Driscoll was obtained by fraud, and that the decree in the equity case adjudging one-half of the judgment to be paid to Shanahan, administrator, was also obtained by fraud and before said case had come on for hearing before the court. There is no evidence in

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support of this latter objection. At the time of filing the answer in the mandamus case the city attorney of South Omaha presented and filed the petition of Owens and others, against the city and its officials and Shanahan, administrator, seeking to enjoin the payment of the Driscoll judgment, which petition alleged the same grounds of fraud both in respect to the original judgment against the city and the decree in the equity case requiring the city to pay one-half of the judgment to Shanahan and sought to have both the judgment in the law action and the decree in the equity case held for naught and payment of the judgment perpetually enjoined. As soon as this petition in the injunction case was filed, Shanahan, administrator, answered, denying the allegations of fraud in respect to the obtaining of both of the judgments, and without waiting for answer day, by agreement of the parties, the mandamus case and the injunction case were tried together and decided at the same time, the result being that the court entered a decree in the injunction case enjoining payment and dismissed the mandamus proceeding denying the writ. To reverse these two judgments the cases are brought here, one upon appeal and one upon petition in error.

The only question which we think it is necessary to consider or decide is, whether the city of South Omaha and its taxpayers were bound by the decree of October, 1897, in the case of *Shanahan, Administrator, v. The City*. The petition in that case pleaded the judgment rendered in favor of Mrs. Driscoll, and made that judgment the basis or cause of action in the equity suit. It also alleged the assignment to Madden and charged that that assignment was procured by fraud. It then prayed that the assignment be set aside; that the city be adjudged and decreed to pay the full amount of the judgment to the plaintiff in his capacity as administrator; that he recover costs and have such other and further relief as he may be in law and in equity entitled to. There was due service of summons and the case remained pending for more

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than a year before it was disposed of. The decree, among other things, provided:

"It is further considered, adjudged and decreed by the court that the said defendant, the city of South Omaha, pay to the plaintiff herein in his capacity as administrator, or to such assignee of the plaintiff, as the county court of Douglas county may, by proper order of distribution of the assets of the estate of said Catherine Driscoll, direct and order, one-half of the full amount of the aforesaid judgment in the said case of *Catherine Driscoll v. The City of South Omaha*, together with legal interest thereon from the date of the rendition of the judgment."

Whether there was or was not fraud in the obtaining of the original judgment in the law action is not open to inquiry if the decree in *Shanahan v. South Omaha* is valid. In this equity suit of *Shanahan v. South Omaha* the cause of action was the previous judgment obtained in the law action, and that was the only cause of action as between Shanahan and the city. Shanahan's cause of action as against the assignee of the judgment was the fraud practiced in obtaining the assignment, but as between him and the city the sole and only cause of action was the judgment rendered in favor of Catherine Driscoll, and his sole prayer was that the city be decreed to pay him that judgment. Upon elementary principles, the judgment in the law action was thereby merged in the decree.

In Freeman, Judgments [4th ed.], section 215, the rule is thus stated: "The entry of a judgment or decree establishes, in the most conclusive manner, and reduces to the most authentic form, that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty." The same author in section 216 says: "A judgment is extinguished when, being used as a cause of action, it grows into another judgment."

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In Herman, Estoppel and Res Judicata, page 279, section 244, the author states the rule thus: "A judgment extinguishes the demand, and if a plaintiff bring two actions for the same cause a judgment in one is a bar to the other, and is conclusive in any future litigation of the same question between the parties and those claiming under them, whether the question arises either directly or indirectly or collaterally in such subsequent litigation, provided the question of estoppel is brought before the court in the proper form; and it makes no difference in this respect that the object of the first suit was different from the second. A judgment against the defendant for the amount of a note or claim for goods sold, etc., bars an action for fraud in obtaining the note or goods." The same author at page 562, section 468, states that a judgment agreed upon as the result of a compromise has the same binding effect as one resulting from litigation contested to the end and that such judgment is a bar to any subsequent attempt to reopen the matter in litigation. Again at page 44, section 52, he says: "When judgment is taken by default, the adjudication will be conclusive of the existence and validity of the right or demand for which suit is brought. A judgment by default regularly entered is as binding as any other, so far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though in some cases the amount to be recovered must be afterwards ascertained by jury."

In *Corcoran v. Canal Co.*, 94 U. S., 741, the supreme court of the United States held that where a party has an opportunity to make a defense the decree of the court is conclusive upon him upon every defense that he might have made to the matters alleged against him.

It is unnecessary to cite further authorities upon a proposition so elementary. When the suit of Shanahan against the city of South Omaha was commenced in the fall of 1896 the basis of the relief sought was the judgment previously rendered in favor of Mrs. Driscoll, and



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it was so alleged in the petition. The relief sought was a decree directing its payment to Shanahan, administrator. The petition and summons advised defendants therein that the plaintiff was asking a decree requiring the city to pay the judgment to him. The validity of the judgment was thereby made matter of issue between the plaintiff and the city. If there was any reason, grounded on fraud, on account of which the judgment could have been attacked and held invalid, the city should have made answer to Shanahan's petition and questioned the legality of the judgment, and sought to have it avoided as being obtained by fraud. Instead of doing so the city made no appearance whatever. Its failure to appear was its own neglect. There is no evidence tending to show that the decree was taken by any fraudulent or unfair means. The decree was according to the allegations of the prayer of the petition and that decree forever after bound the city as to the validity of the original judgment and cut off all defense based upon any fraud perpetrated in obtaining it.

There can be no question that the judgment is equally conclusive upon the city and its taxpayers. A judgment against a municipal corporation would be of no value, if matters of defense to the action, which were available to the city before its rendition, might be relitigated at the suit of individuals. In Herman, Estoppel and Res Judicata, page 166, section 155, the rule is thus stated:

"So where a judgment has been rendered against a municipal corporation upon coupons or for any other valid claim, and proceedings are commenced by mandamus to compel the levy of a tax to pay the judgment, the regularity of the proceedings on which the judgment was rendered or the validity of the judgment can not be contested in answering to the rule to show cause why a mandamus should not issue. The only way in which irregularities can be taken advantage of is by appeal. No taxpayer can prevent the levy of such tax, and relitigate the matters adjudicated in such action against the corporation."



Dodd v. Skelton.

It is recommended that the judgments in both cases be reversed and that the suit of *John O. Owens v. The City of South Omaha* and John M. Shanahan and others, general No. 10,988, of this court, be dismissed and the suit of *John M. Shanahan, Administrator, v. The City of South Omaha* and others, general No. 10,989, of this court, be remanded to the district court for Douglas county with instructions to grant a writ a mandamus as prayed.

DUFFIE and ALBERT, CC., concur.

The judgments in both cases are reversed and the suit of *John O. Owens v. The City of South Omaha* and others, general No. 10,988, of this court, is dismissed, and the suit of *John M. Shanahan, Administrator, v. The City of South Omaha* and others, general No. 10,989, of this court, is remanded to the district court for Douglas county with instructions to grant a writ of mandamus as prayed.

10,988 REVERSED AND DISMISSED.

10,989 REVERSED WITH DIRECTIONS.

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JOHN DODD, ADMINISTRATOR OF THE ESTATE OF HANNAH  
DODD, DECEASED, v. JOE SKELTON.

FILED FEBRUARY 6, 1902. No. 10,991.

Commissioner's opinion. Department No. 3.

1. **Witnesses: TESTIMONY OF PARTY IN INTEREST: STATUTES.** Section 329, Code of Civil Procedure, does not prohibit a party to the suit, or one having a direct legal interest in the result thereof, from testifying to transactions or conversations relevant to the issues, had with the agent of a deceased person.
2. **Oral Contract to Pay Part of the Price of Land: VALIDITY.** An oral agreement by the grantee to pay part of the consideration agreed on as the purchase price of land sold, to a third party, may be enforced by the party for whose benefit it was made.

ERROR from the district court for Custer county.  
Tried below before SULLIVAN, J. *Affirmed.*

Dodd v. Skelton.

*J. R. Dean*, for plaintiff in error.*Holcomb Bros., contra.*

DUFFIE, C.

December 9, 1897, Joe Skelton filed a claim against the estate of Hannah C. Dodd for \$32.20, interest paid on a certain mortgage, and \$7.15, money loaned. This claim was allowed by the county court, and an appeal was taken to the district court where judgment was entered for the sum of \$46. From this judgment the administrator has taken error to this court, his objection being only to the allowance of the item for interest paid.

The record discloses that W. A. Skelton, a brother of the defendant in error, was the owner of eighty acres of land in Custer county. Charlotte C. Johnson had a first mortgage, and Hannah C. Dodd, the decedent, was the owner of a second mortgage on this land. The defendant in error advanced the money, \$32.20, to pay one of the maturing coupons on the Johnson mortgage. The claim filed shows this payment to have been made May 2, 1892, and the district court so found, or at least interest from that date was allowed on the amount, but we are satisfied that this is not the correct date, as the deed, to which reference will hereafter be made, is dated November 6, 1891, and was filed for record the 14th day of the same month. At the date of the deed above referred to, W. A. Skelton deeded the mortgaged premises to Mrs. Dodd, the plaintiff in error acting for her in the transaction, and it is claimed as a part of the consideration for said conveyance, Mrs. Dodd was to repay to the defendant in error the amount paid by him as interest on the Johnson mortgage.

W. A. Skelton and his wife both testify that when the deed was made John Dodd, who, as before stated, conducted the business for his mother, agreed to pay this interest. Objection is made that these witnesses are incompetent under section 329 of our Code of Civil Pro-

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cedure. We think the objection is not well taken. The provision of section 329, while it prohibits a party from testifying in certain cases to a personal transaction with a deceased person, does not extend to transactions with the agent of such person. *Pratt v. Elkins*, 80 N. Y., 198.

It is further objected that the defendant in error paid this interest by way of gift to his brother. While defendant in error testified that he did not expect his brother would repay the money so advanced by him, we can not say from the evidence that it was given and accepted as a gift; nor do we think, even conceding that to be the case, that it would relieve the estate, of which plaintiff in error is administrator, from carrying out an express agreement made by the decedent through her agent to repay it.

It is further objected that the agency of John Dodd is not established by any competent testimony. The testimony of W. A. Skelton relating to this question was, we think, incompetent, as the money was advanced for him and he would be liable for its repayment; but the circumstances of the case are sufficient to establish such agency. The deed was accepted and placed of record, and, as we understand, the estate now claims the benefit of the conveyance. Certainly, Mrs. Dodd could not have the benefit of the conveyance without payment of the consideration for which it was made.

The defendant in error was allowed to testify that Mrs. Dodd had not repaid him the amount of interest for which the claim is made. Plaintiff in error complains of this and insists that, under the provisions of the statute above referred to, such evidence is made incompetent, and that testimony negating a transaction with a deceased person is as clearly within the statute as that in affirmation thereof. This may be true, but whether so or not can make no difference in this case, as the error, if error it was, was without prejudice to the rights of the plaintiff in error. Payment is an affirmative defense, and the burden was on the defendant in error to establish it. That incompetent evidence was admitted to establish a fact which

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the law presumes to exist in the absence of any evidence is not reversible error. *Lerche v. Brasher*, 104 N. Y., 161; *In re Brown's Estate*, 60 N. W. Rep. [Ia.], 659.

The agreement is not within the statute of frauds. When Mrs. Dodd took a conveyance of this land, she simply agreed to pay a part of the consideration to Joe Skelton, instead of to W. A. Skelton, her grantor.

We recommend the affirmance of the judgment of the district court.

AMES and ALBERT, CC., concur.

AFFIRMED.

ALAMANDER CORNELL, APPELLEE, v. SUSAN KIME ET AL.,  
APPELLANTS.

FILED FEBRUARY 6, 1902. No. 10,999.

Commissioner's opinion. Department No. 1.

**Mechanics' Liens: LIMITATION OF ACTIONS: PRESUMPTIONS.** Where the items constituting a mechanic's lien show that more than four months have intervened between the dates of performing the service or furnishing the material it raises the presumption that the work was performed or the materials were furnished under separate contracts, but this presumption is overcome by proof that there was but one contract covering the whole.

APPEAL from the district court for Box Butte county. Tried below before WESTOVER, J. *Affirmed.*

*R. C. Noleman*, for appellants.

*W. G. Simonson*, contra.

DAY, C.

Alamander Cornell commenced this suit in the district court for Box Butte county to foreclose a mechanic's lien which he claimed upon lot 2 in block 11, in the city of Alliance. Susan Kime and her husband, Joseph A. Kime, were made defendants. A trial was had to the court resulting in a judgment in favor of the plaintiff for the

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sum of \$84.20 and costs of suit, and decreeing that the premises be sold to satisfy the judgment. To reverse this judgment the defendants have brought the case to this court by appeal.

The record shows that on or about August 1, 1895, the plaintiff entered into a verbal contract with Susan Kime to paper and paint a dwelling-house owned by her situated upon lot 2 in block 11 in the city of Alliance. The contract provided that the plaintiff was to receive for his services the usual and customary prices paid for the character of the work he agreed to perform. The papering and the inside painting was to be completed at once; the time of completing the outside work was left largely to the convenience of plaintiff, no time being agreed upon. Pursuant to this contract the plaintiff commenced work and finished the papering August 20, 1895, and continued to perform services under the contract at various intervals from said date up to and including July 15, 1897, when the last item of work was performed. On November 13, 1897, the plaintiff filed with the county clerk of Box Butte county, a mechanic's lien against said lot as the property of Susan Kime and claimed a balance due under said contract of \$70.65. This claim for lien was duly sworn to and complied with all the formalities of the statute to render it a valid and subsisting lien upon the premises. The items of service as shown by the lien indicate that nothing was done from September, 1895, to January 11, 1896, and from that date there is an hiatus of time to July 15, 1897, on which date the plaintiff finished painting 230 yards, amounting to \$32.

Appellants insist that as more than four months elapsed from the date of the furnishing of the last item of labor and that previously rendered, that a lien will not attach for the items preceding the hiatus. This contention would be good were it not for the fact that the record shows affirmatively by the testimony of both plaintiff and defendants that the services rendered were performed under one contract. When the items constituting a

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mechanic's lien show that more than four months have intervened between the dates of performing the service or furnishing the material it raises the presumption that the work was performed or the materials were furnished under separate contracts, but this presumption is overcome by proof that there was but one contract covering the whole.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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JAMES B. FINNEY, APPELLANT, v. ABNER D. GALLOP ET AL., APPELLEES.

FILED FEBRUARY 6, 1902. No. 11,000.

Commissioner's opinion. Department No. 3.

**Set-Off:** DEBT DUE PARTNER AS AGAINST PARTNERSHIP DEBT: ATTORNEYS' LIENS. G. obtained judgment against the firm of C. & F. for eight hundred dollars. On the rendition of the judgment, W. and P., attorneys for G., filed their claim for an attorneys' lien on the judgment and gave notice thereof. Afterwards, F., one of the partners, commenced an action against G. on a note made to him by G., alleging that both C., the other member of the firm, and G., the judgment creditor, were insolvent, and that he alone was responsible. He asked that any judgment entered against G. on the note might be set off against the judgment entered in favor of G. against C. & F. W. and P. intervened and asked that their attorneys' lien be protected. *Held*, That to the extent of their lien the attorneys should be protected and that to that extent the set-off could not be allowed.

APPEAL from the district court for Cherry county.  
Tried below before KINKAID, J. *Affirmed*.

*L. K. Alder*, for appellant.

*C. Patterson* and *W. W. Wood*, contra.

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DUFFIE, C.

January 12, 1898, Abner D. Gallop commenced an action in the district court for Sheridan county, Nebraska, to recover from Carter & Finney, a partnership, the sum of \$3,884, damages claimed to have been suffered by him in consequence of the diseased condition of a flock of sheep alleged to have been sold to him by said partnership. A trial of the case resulted in a judgment against the defendant partnership for \$800. On rendition of the judgment, W. W. Wood and C. Patterson, the attorneys who conducted the case for the plaintiff, filed a claim for an attorneys' lien for services rendered in that action in the sum of \$250 each. Gallop did not pay cash on his purchase of the sheep, but executed his note to James B. Finney alone, for the sum of \$1,725, the agreed price, and secured the same by chattel mortgage on the flock. One of the issues in that action was the existence of a partnership between Carter and Finney. This issue was found against the defendant, and, as before said, judgment went against the partnership.

September 14, 1898, James B. Finney commenced this action in equity in the district court for Cherry county, making Abner D. Gallop the sole party defendant. In his petition he set out the note made to him by Gallop and asked for judgment thereon. He alleged that at the date of the note he sold to Gallop 1,150 lambs for the agreed price of \$1,725, for which the note in suit was given. His petition further recites the bringing of the suit in Sheridan county by Gallop, the recovery of a judgment by Gallop, in the sum of \$800, against Carter & Finney, and alleges that both Carter and Gallop are wholly insolvent, and that the judgment in favor of Gallop will have to be paid by himself. He, therefore, asks the court to set off so much of any judgment that may be entered against Gallop on the note in suit, against the judgment entered in Gallop's favor against Carter & Finney. Wood and Patterson intervened in the action, setting up

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their attorney's lien, and denying the right of Finney to set off any judgment he may obtain against Gallop, except for the excess remaining after the payment of their attorney fees. A decree was entered giving Finney judgment against Gallop for the sum of \$1,262.30, and finding that W. W. Wood and C. Patterson each had a valid claim against the judgment in favor of Gallop against Carter & Finney in the sum of \$260.18, and directing that after deducting the claim and lien of Wood and Patterson that the residue of the \$800 judgment in favor of Gallop, amounting to the sum of \$312.18, be paid and satisfied by setting off against the same an equal amount of the judgment entered in favor of Finney in this action.

The appellant urges with much earnestness that the judgments which he wishes to off-set one against the other arose out of the same transaction, and that the existence of an attorney's lien against the \$800 judgment in favor of Gallop does not stand in the way of giving him this right. We are not inclined to agree with this contention. Gallop's cause of action against Carter & Finney sounded in tort, and even if the note executed by Gallop in payment for the sheep was owned by the partnership, it could not, under section 104 of our Code of Civil Procedure, have been used as a set-off in that case. That section is as follows: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Much less could the note be set off against Gallop's claim against the partnership, it not being a claim against him in favor of the partnership, but in favor of Finney, one of the individual members thereof. Until Gallop's note was reduced to judgment, therefore, it could not be used as a set-off at all; and we are not certain that a judgment existing in favor of an individual member of a partnership may be used as a set-off against a demand held by a third party against a partnership.

Again, in *Rice v. Day*, 33 Neb., 204, it was held that "The lien of an attorney upon a judgment obtained by



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him to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the action or to any set-off." It is insisted that this holding is shaken, if not overruled, in *Field v. Maxwell*, 44 Neb., 900. We do not think that the two cases in anywise conflict. In the latter case it was held that the lien of an attorney could not take precedence of a set-off pleaded in the same action. In other words, that the lien of an attorney extends only to the judgment actually recovered, and does not prevent a defendant when sued from asserting a set-off which he may hold against the plaintiff in the action. The theory of the case is that the attorney's lien shall not be interposed to prevent the defendant from setting up and receiving the benefit of any legal set-off which he may hold against the plaintiff at the date of the trial. When the balance is struck between the plaintiff and defendant and it is ascertained that the plaintiff is entitled to a judgment, the attorney may claim and enforce a lien for his services upon the balance due his client and for which judgment is entered. But no claim for an attorney's lien can prevent the defendant from obtaining the benefit of any just demand he may have against the plaintiff and which may properly be set off against the plaintiff's demand in the same action. But, if the defendant does not wish to assert a counter-claim which he holds against the plaintiff, and does not care to reduce the claim of the plaintiff by that amount, he can not, after the entry of judgment against him, interfere with the lien of the attorney for services in that action, or prevent its enforcement by an independent action brought to enforce a demand which could have been used as a set-off in the former suit. As was said in *Marshall v. Meech*, 51 N. Y., 140, "To the amount of such lien, the attorney is to be deemed an equitable assignee of the judgment." Wood and Patterson in this case, by their liens properly taken, became, to the extent of their claims, the equitable assignees of the judgment against Carter & Finney in favor of Gallop. Their rights as such were vested when

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their liens were perfected, and can not be interfered with by any proceedings thereafter taken by Carter & Finney or either member of that partnership, in the assertion of claims held by them or either of them against Gallop. The decree of the district court was right, and we recommend that it be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

THE NORTHWESTERN COLLEGE OF NAPERVILLE, ILLINOIS,  
APPELLEE, V. JESSIE R. SHRECK ET AL., IMPEADED  
WITH SARAH A. McDONALD, APPELLANT.

FILED FEBRUARY 6, 1902. No. 11,008.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: FILING COPY OF APPRAISAL:** The filing with the clerk of the court of a substantially correct copy of appraisement of real estate for a judicial sale, is sufficient.
2. **Mortgage Foreclosure: SHERIFF'S RETURN: TIME OF FILING COPY OF APPRAISAL.** The fact that a copy of appraisement was not filed until the day following the one on which it was made does not of itself show that the sheriff's return, that he filed it forthwith, is incorrect.
3. **Mortgage Foreclosure: SHERIFF'S RETURN: MATERIALITY OF PUBLISHER'S AFFIDAVIT.** Where the sheriff's return of a sale shows a sufficient notice and is not denied, the fact that the printer's affidavit was made before notice was complete and fails to state fully the facts as to a legal publication, is not material.

APPEAL from the district court for Phelps county.  
Tried below before BEALL, J. *Affirmed.*

*A. J. Shafer*, for appellant.

*Ed P. Smith* and *W. P. Hall*, contra.

HASTINGS, C.

The reasons for refusing confirmation and setting aside the sale urged by appellant, who brings this case to re-

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verse a confirmation of the sale, are: 1, that a copy of the appraisement was not filed before the sale; 2, that notice was not given as required by law; 3, that notice was not published for thirty days before sale, and, 4, that affidavit of publication was made before thirty days of publication had run.

The first objection rests on the fact that in the original appraisal, the interest of "defendants" is stated to be valued and in the copy the interest of "J. R. Shreck et al., defendants" is mentioned, the difference consisting of the insertion of the words, "J. R. Shreck et al." in the copy before the word "defendants." It is further urged that the copy was not filed until the day following the appraisement. Neither of these objections seems good. The appraisement is simply to establish a minimum price below which the land may not be sold. The copy is for the information of parties and bidders, and is filed for their convenience and to enable objections to be made, if it is irregular and prejudicial to anyone's rights, without the necessity of looking up the sheriff. A substantially correct copy is all that is needed and that appears in this case. The return of the sheriff shows that the copy was "forthwith" deposited with the clerk of the court. This return is not impeached by the fact that it was deposited on the 3d of February and the appraisement made on the 2d. Forthwith in this connection means simply as soon as with reasonable dispatch in the ordinary course of business it can be done. There is nothing to show that such dispatch was not used in this case.

The complaints in regard to notice entirely fail to show that the officer's return as to notice is untrue. Both return and affidavit show full publications in a weekly paper, the first being February 3, the last March 3, and the sale March 8. The fact that the publisher's affidavit was made on March 3, and does not affirmatively show there was no other than the regular weekly publications of the paper, in no way tends to contradict the sheriff's return.

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It is therefore recommended that the order of confirmation be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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LOAN & TRUST SAVINGS BANK, APPELLEE, v. H. H. STODDARD ET AL., IMPEADED WITH HOLCOMB BROS., APPELLANTS, ET AL.

FILED FEBRUARY 6, 1902. No. 11,015.

Commissioner's opinion. Department No. 1.

1. **Pleading: FAILURE TO FILE REPLY: WAIVER BY TRIAL.** Where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat it so notwithstanding no reply appears in the record.
2. **Evidence: CONSIDERATION: BONA FIDE PURCHASER.** Evidence examined and *held* to sustain a consideration for the notes and mortgage and that plaintiff was an innocent purchaser for value before maturity.
3. **Pleading: CORPORATE CAPACITY.** At common law a corporation may sue and be sued in its corporate name without an averment of its corporate capacity, and the provisions of our Code have not changed the common law rule in that regard.

APPEAL from the district court for Dawson county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Fred A. Nye*, for appellants.

*Wilson & Brown*, contra.

DAY, C.

The Loan & Trust Savings Bank of Concord, New Hampshire, brought this suit in the district court for Dawson county against H. H. Stoddard, impleaded with Holcomb Bros. and other defendants, to foreclose a mortgage upon a large tract of land, a description of which it is not necessary to set out. This mortgage was given by H. H. Stoddard and wife to Hiram D. Upton on

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December 14, 1891, as security for the payment of two notes, one for \$6,000 and the other for \$600. On December 15, 1891, the mortgage was duly recorded. On December 23, 1891, the said Upton for a valuable consideration sold and assigned the notes and mortgage above described to the plaintiff. Among the lands described in the plaintiff's mortgage upon which foreclosure was sought, was section 21, township 11, north of range 21, in Dawson county, upon which the defendants, Holcomb Bros., held mortgages executed by Stoddard and wife on December 1, 1893, to secure the payment of two promissory notes. One of these notes was secured by a mortgage upon the south half of said section, the other by a mortgage upon the north half of said section. The defendants, Holcomb Bros., for answer to the petition alleged a want of consideration for the notes and mortgage; that the same were never sold and transferred to the plaintiff before maturity and that nothing was due the plaintiff thereon, and denied generally the averments of the petition. By way of cross-petition, the defendants, Holcomb Bros., prayed that their mortgages above described be decreed a first lien upon said section 21, and for a decree of foreclosure. Upon the trial the court found that the plaintiff's mortgage was a first lien upon the lands described in the petition and awarded the plaintiff a decree of foreclosure. As to defendants, Holcomb Bros., the court found their mortgages to be a second lien upon section 21 of said premises and ordered that the several tracts be separately sold and the proceeds brought into court for further order. From this judgment the defendants, Holcomb Bros., have appealed to this court.

It is now urged that, inasmuch as the plaintiff filed no reply, therefore the want of consideration for the notes and mortgage stands admitted on the record. Without discussing whether such a denial in the answer to the allegations of the petition presents new matter calling for a reply, it is sufficient in this case to say that upon the trial both parties treated the consideration as an

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issue in the case. The chief contention in the court below was over the want of consideration. It is now the settled rule of this court that where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat them so, notwithstanding no reply appears in the record. *Schuster v. Carson*, 28 Neb., 612. In *Missouri P. R. Co. v. Palmer*, 55 Neb., 559, it is said: "Where, in the trial of a cause both parties treat an affirmative defense as traversed, it will be so considered in this court although the plaintiff filed no reply either before or after judgment." *Minzer v. Willman Mercantile Co.*, 59 Neb., 410.

Appellants also insist that there was a failure in the proofs to establish a consideration for the notes and mortgage. The record shows that the plaintiff produced the note and mortgage properly indorsed, and offered them in evidence. This was sufficient to raise a presumption that the note was supported by sufficient consideration and made a *prima facie* case for the plaintiff. After the introduction of the note and mortgage in evidence, the burden was upon the defendants to impeach the *bona fides* of the purchase and the consideration upon which it rested. Instead of overcoming this presumption the testimony of Stoddard and other witnesses on behalf of the appellants conclusively established that the notes and mortgage were founded upon a valuable consideration and that the plaintiff was a good faith purchaser for value.

At the commencement of the trial the appellants objected to the introduction of any testimony in the case on behalf of the plaintiff for the reason that the petition did not state a cause of action, and for the further reason that no legal capacity was shown in the plaintiff to maintain the suit. The point urged is that there was no allegation of the corporate capacity of the plaintiff. In *Angel and Ames, Corporations*, section 632, it is said: "It is, however, generally admitted, that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation, or averring

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that it is a corporation, if the act be private." At common law a corporation may sue and be sued in its corporate name, without an averment of its corporate capacity, and the provisions of our Code have not changed the common law rule in that regard. *Exchange National Bank v. Capps*, 32 Neb., 242. In *Holden v. Great Western Elevator Co.*, 72 N. W. Rep. [Minn.], 805, it is held: "In an action by or against a corporation it is not necessary to allege that it is a corporation, except in cases where the fact of corporate existence enters into, and constitutes a part of, the cause of action itself." *Stanley v. Richmond & D. R. Co.*, 89 N. Car., 331.

The decree rendered by the trial court is fully sustained by the proofs. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

HOLCOMB, J., took no part in the decision.

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SECURITY INVESTMENT COMPANY, APPELLEE, v. WILLIAM W. LOTTRIDGE ET AL., APPELLEES, IMPLEADED WITH THE PHILADELPHIA & READING COAL AND IRON COMPANY, APPELLANT.

FILED FEBRUARY 6, 1902. No. 11,018.

Commissioner's opinion. Department No. 1.

1. **Descent and Distribution: VESTING OF TITLE SUBJECT TO RIGHT OF ADMINISTRATOR.** Real estate other than the homestead of an intestate decedent, descends to his heirs and the title vests immediately in them subject to the administrator's right of possession and to its application in payment of decedent's debts.
2. **Descent and Distribution: ADVANCEMENTS TO HEIR: EFFECT IN ATTACHMENT AGAINST ESTATE.** Where, pending the settlement of a decedent's estate, advancements have been made in good faith to an heir by the administrator with the assent of the coheirs, which were accepted by the recipient as in full of his share and as en-

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titling the other heirs to his proportion of the remaining estate, the heir who has under such arrangement received his full share of the estate, has not thereafter an attachable interest in real property of the deceased.

APPEAL from the district court for Lancaster county. Tried below before FROST, J. *Affirmed.*

*S. L. Geisthardt*, for appellant.

If one has received even more than his share of an estate in the administrator's hands, that would not give any of his co-heirs or his co-distributees any lien on his real estate. Any moneys or property received could affect the personalty alone. *Bailey v. Warner*, 28 Vt., 87; *Allison v. Graham*, 67 Ia., 68, 24 N. W. Rep., 597; *Proctor v. Newhall*, 17 Mass., at page 81; *Hancock v. Hubbard*, 36 Mass., 167; *Jones v. Treadwell*, 169 Mass., 430, 48 N. E. Rep., 339; *Mann v. Mann*, 59 Tenn., 245; Woerner, American Law of Administration [2d ed.], section 564, page 1350, note 2, which cites *Thompson v. Myers*, 95 Ky., 597; *Hagadorn v. Hart*, 62 Hun [N. Y.], 94; *Dearborn v. Preston*; 7 Allen [Mass.], 192, also note 4 which cites *Smith v. Kearney*, 2 Barb. Ch. [N. Y.], 533, 549; *Sartor v. Beaty*, 25 S. Car., 293, 303; *La Foy v. La Foy*, 43 N. J. Eq., 206.

The cases cited by appellees to sustain the contention that the distinction between personal property and real estate should be obliterated are based upon the doctrine of advancement and are not applicable to the case at bar.

*Walter J. Lamb*, contra.

If one's share in an estate is received or diminished by his drawing it, he no longer has any share or interest; the creditors stand precisely in the shoes of the heirs, and if the heir has no interest the creditor obtains none. *Foltz v. Wert*, 103 Ind., 404, 410; *Armstrong v. Fearnaw*, 67 Ind., 429; *In re Dickinson's Estate*, 23 Atl. Rep. [Pa.], 1053; *Green v. Brown*, 44 N. E. Rep. [Ind.], 805; *Pomcroy v. Chandler*, 30 Atl. Rep. [N. J.], 1092.



**HASTINGS, C.**

Appellant in this case states that the question is whether at the time of the levy of the attachment against William W. Lottridge on the property involved he had any interest in it, and also whether William W. Lottridge or John N. C. Lottridge, his brother, had at the time of the filing of appellant's cross-bill in this action any interest in \$1,000 still unpaid on the property from one J. R. Bennett, who had bought it of the Lottridge heirs, and which can be applied on appellant's judgment against William and John. Appellees assert that the sole issue is whether or not William W. Lottridge had any interest in the attached property at the time of the levy.

It seems that John D. Lottridge died in Lancaster county in 1874, intestate, leaving a widow, now Mrs. Kern, and three children, William W., John N. C., and Josephine D., defendants. Neriah B. Kendall became administrator. In 1893, he conveyed to William W. some lands which never belonged to the estate, at an agreed price of \$2,600. Defendants claim this was in payment of William's share of the estate. In 1897, William W., John N. C., and one Harry P. Hermance formed the Lincoln Coal Company, and contracted the debt which is the basis of appellant's claim. Subsequently, in the same year, the widow and heirs executed plaintiff's mortgage for \$2,500 and the money was used by William and John in the coal business. April 16, 1898, the appellant sued William and John in the United States circuit court, and issued an attachment against William on the ground that he was fraudulently disposing of his property. This attachment was levied on the property embraced in plaintiff's mortgage, April 20, 1898. It does not seem to be disputed that it became a lien upon whatever interest William had in this property at that time. It is not disputed that the property belonged to his father's estate, and at the time of the levy the estate had not been settled,

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and there had been no distribution to the heirs. Four days earlier, April 16, a mortgage was made by William W. and his wife "to the estate of John D. Lottridge," for \$2,600. September 18, 1898, the widow and heirs conveyed the land in dispute subject to plaintiff's mortgage to John R. Bennett for an agreed consideration of \$1,500, \$1,000 of this Bennett retained till the title should be perfected. Bennett did not know of the \$2,600 mortgage, and it was attempted to be released by an instrument signed by the widow and heirs, September 16, 1898. March 11, 1898, plaintiff commenced its suit for foreclosure. Josephine D. Lottridge filed a cross-bill claiming to own the \$2,600 mortgage and asking its foreclosure. Appellant set up the lien of its attachment, which had been sustained, and judgment rendered in the attachment action October 15, 1898, for \$4,102.25 and costs. Appellant claimed a conspiracy of the Lottridge heirs to defraud; that the \$2,600 mortgage of William W. and wife to "the estate of John D. Lottridge" which Josephine was asserting, was entirely without consideration and not delivered; that the Bennett deed was without consideration and a part of the fraudulent conspiracy, and asked that the deed to Bennett and the mortgage to the estate of John D. Lottridge be declared null and void and the land sold and applied in payment of appellant's judgment. Bennett also answered, claiming to be a *bona fide* purchaser of the property, without notice of appellant's attachment; admitted plaintiff's lien and the \$2,600 mortgage to Josephine, and claimed that the latter, by reason of his warranty deed, inured to his benefit. William W. Lottridge and wife, and the widow, denied appellant's claim, and alleged that the property was part of the real estate of John D. Lottridge in his lifetime; that it descended to his three heirs subject to the dower interest of his widow; that prior to April 16, 1898, William W. had received more than his share of the estate and had agreed to release to Josephine D. and to Mrs. Kern all of his rights, and that upon this consideration he ex-

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ecuted the note and mortgage set out in Josephine D.'s answer and cross-petition, and denied that he had any interest in the attached property at any time subject to the attachment.

It will not be necessary to consider plaintiff's petition as it is no longer contested. The sole question is as to the right of the appellant in the surplus, if any, after plaintiff's mortgage is satisfied. The court found against the appellant, and found that William W. Lottridge and John N. C. Lottridge had no interest in the premises, or any of the proceeds that might arise from their sale, and dismissed appellant's cross-bill; directed the sale of the premises upon plaintiff's mortgage and that after the application of the proceeds of the sale in payment of plaintiff's lien the residue should be paid to Josephine D. Lottridge and Mrs. Julia Lottridge Kern. The court having allowed John R. Bennett nothing, and his claim being denied by appellant, and no appeal being made on his behalf, it is not necessary to consider any claim for money in his hands.

The question remaining is, therefore, whether as stated by appellant by reason of its attachment against William W. Lottridge, appellant acquired an interest in this property such as to entitle it to share in the proceeds of the sale. The appellant says that in the first place it is not true that William W. Lottridge, before the levy of the attachment, had received his full share of his father's estate from the administrator. In the second place, that it is immaterial whether or not he had. The real estate descended to him on the death of his father and his title in it could only be transferred by conveyance or partition, that the lien of appellant's attachment would bind his portion of the real estate independently of the condition of his account with the administrator. It seems clear that there is evidence from which the trial court was warranted in finding as the county court did, that William W. and John N. C. Lottridge had each received his full proportionate share of this estate before any lien of appel-

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lant's attached. At the final settlement of the estate, November 25, 1898, the administrator is allowed a credit of \$2,000 for the lands conveyed by him to William W. Lottridge in 1893, in full of the latter's share in the estate. The administration was evidently very lax, but it seems that the trial court was justified in finding that there was an agreement that the amounts received by William and John N. C. from the administrator should be deemed advancements upon their shares of the real estate and charged against them. The question in dispute, therefore, takes this form: Does such an agreement upon a consideration which has been received constitute an equitable transfer or an equitable lien upon land in this situation which will be enforced against a subsequent attachment which, however, is levied before a valid transfer is made?

It is assumed that these brothers and sister were joint tenants of the property. It descended to them subject to the mother's dower and to the administrator's right of possession pending the settlement of the estate and subject to the debts of the father. *Rakes v. Brown*, 34 Neb., 304; Compiled Statutes, chapter 23, sections 209, 292. The possession of this land when the attachment was levied was in the administrator so far as appears. He was a party to the agreement by which William's share was to be deemed paid off and to go to the cotenants. The mortgage made and filed April 16, the day appellant's attachment suit was commenced, was an attempt to protect this arrangement against appellant's proceeding.

An attempt was made at the argument to claim that the assignment of the real estate to Josephine D. Lottridge attempted to be made on November 25, 1898, by the county court at the settlement of the estate was final and conclusive upon appellant, unless appealed from and set aside. We find no such claim in the briefs, and no authority is cited for this except section 289, chapter 23, Compiled Statutes, which provides that on the final settlement of the estate by the administrator or executor "the county court shall, by a decree for that purpose, assign

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the residue of the estate, if any, to such other persons as are by law entitled to the same." Section 292, same chapter, says, "When such estate shall consist in part of real estate, and shall descend to two or more heirs, devisees, or legatees, and the respective shares shall not be separate and distinguished, partition thereof may be made as provided by law." The effect of these provisions seems to be to give the executor or administrator the possession pending settlement of the estate, and to require an order for delivery of the real estate in bulk to its owners when this is done, and leave them then to apply to the district court for partition, if they can not divide it themselves. If this is to be taken as the true view, then the question here is simply, did William W. Lottridge on April 20, 1898, when this attachment was levied, have any interest in this land for which, after simply waiting till the estate was settled, or should have been, and the administrator's rights extinguished, he could have successfully brought partition proceedings? It is conceded that an attachment lien, like that of a judgment, takes effect only on defendant's equitable interest in the attached premises. The attachment can have no stronger effect than to put appellant into William's shoes on the date of its levy. Would William W. Lottridge after getting this land of the administrator for his share of the estate with the assent of the other heirs and under their agreement that it should be credited to the administrator on their behalf, while still holding it, be heard on a claim to get his share over again in partition against his coheirs? The question would seem to admit of but one answer, and that the one the trial court gave. *Foltz v. Wert*, 103 Ind., 404.

It is therefore recommended that the decree of the district court be affirmed.

**DAY and KIRKPATRICK, CO., concur.**

**AFFIRMED.**

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**BENJAMIN LOMBARD, JR., APPELLEE, V. JOHAN PASUSTA ET AL., APPELLANTS.**

**FILED FEBRUARY 6, 1902. No. 11,022.**

**Commissioner's opinion. Department No. 2.**

- 1. Judicial Sale: SECOND OFFER FOR SALE: APPRAISAL.** An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether sold under the original, or an alias writ. *Burkett v. Clark*, 46 Neb., 466.
- 2. Judicial Sale: IMPEACHING SHERIFF'S RETURN: EVIDENCE.** One who attacks the appraisal of real estate, because it is claimed that one of the appraisers was not a freeholder, must establish such fact by a preponderance of the evidence, in order to overcome the certificate of the sheriff that the appraisers were both freeholders.

**APPEAL** from the district court for Buffalo county.  
Tried below before SULLIVAN, J. *Affirmed.*

*W. L. Hand*, for appellants.

*A. B. Coffroth*, contra.

**BARNES, C.**

This was an appeal from the judgment and order of the district court confirming a sale of real estate. The appellants objected to the sale and confirmation, for the following reasons: 1st. Because no new appraisal of the property was made before the sale. 2d. Because Frank Adams, one of the appraisers, was not a freeholder.

1. It appears from the record that an order of sale was issued on the 15th day of September, 1897; that under the order the property was duly appraised, advertised and offered for sale, but was not sold for want of bidders; that the order of sale was returned and no further efforts were made to sell the property until January 17, 1899, when a new or *alias* order of sale was issued; that the sheriff, relying on the appraisal under the original order of sale, made no new appraisement. The land, not hav-

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ing been twice offered for sale, was thereupon advertised and sold. In the case of *Burkett v. Clark*, 46 Neb., 466, it was held that "An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under an original, or an *alias* writ." In view of the fact that no effort was made to show that the appraisement under the original writ was too low, or that the land had increased in value between the time of the appraisal and the date of sale, the law above quoted applies with full force, and the court properly overruled the first objection to the confirmation.

2. The appellants, in order to show that Frank Adams, one of the appraisers, was not a freeholder, introduced a deed in evidence, executed by Frank Adams and wife, purporting to convey certain lands to one Frank Vokoun, and also a deed executed by Frank Vokoun and wife to Frank Adams, which purported to convey the same land, described in the first deed, back to said Adams. The first deed was executed before the appraisement of the real estate was made, and the second one was executed after the date of the appraisal. The appellants also called the county treasurer of Buffalo county as a witness, who testified in substance, that he did not know that Frank Adams owned any other land than that described in the deeds introduced in evidence. We are of the opinion that this evidence was not sufficient to establish the fact that the appraiser, Frank Adams, was not a freeholder. The certificate of the sheriff that Adams was a freeholder has the effect to *prima facie* establish his status as such freeholder and it devolves upon one who seeks to overthrow such certificate to show by clear, positive and direct evidence that the same is false. The evidence is insufficient to destroy the effect of the officer's certificate and the court properly overruled the second objection.

The order of the district court should be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.



Livingston v. Moore.

EDWARD A. LIVINGSTON ET AL. V. GEORGE W. MOORE ET AL.

FILED FEBRUARY 6, 1902. No. 11,047.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: INSTRUCTIONS: EXCEPTIONS.** Instructions will not be reviewed unless excepted to in the trial court.
2. **Appeal and Error: FINDINGS: EXCEPTIONS: MOTION FOR NEW TRIAL.** The submission of special findings to the jury upon matters claimed to be irrelevant and immaterial will not be reviewed unless excepted to at the time and assigned as error in the motion for a new trial.
3. **Appeal and Error: NEW CAUSE OF ACTION IN APPELLATE COURT: REPLEVIN: CONVERSION.** A plaintiff in replevin on appeal from justice's court to the district court added an allegation of conversion of the property in connection with a claim for value of its use in his petition. *Held*, That this was not necessarily an attempt to state a different cause of action and was not open to a motion to strike out on that ground.
4. **Replevin: PLEADING: GENERAL DENIAL: SETTING OUT DEFENSES.** Where a defendant in replevin sets up a number of affirmative defenses in his answer, in addition to a general denial, it is not error to strike them out on motion, since anything making against the plaintiff's cause of action may be shown under the general denial.
5. **Appeal and Error: QUESTIONS NOT PROPERLY RAISED IN BRIEFS.** This court is not bound to examine questions not so raised in the briefs as to state fairly what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed*.

*Hurd & Spanogle*, for plaintiffs in error.

*Thomas H. Matters*, contra.

POUND, C.

A very nice question of law is raised upon the instructions given by the court and with reference to the relevancy and materiality of certain special findings submitted to the jury. But neither the instructions nor the



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submission of the several special findings were excepted to in the trial court, nor was the submission of the latter assigned as error in the motion for a new trial. It goes without saying that we will not pass upon them under such circumstances. Error is also assigned upon the refusal to give two instructions tendered by the plaintiffs in error. As to one, we think the instruction given by the court, right or wrong, was more favorable to the party complaining than the one he tendered, since it required less to defeat his opponent's case. As to the other, it asked the court to tell the jury what certain evidence tended to prove, a question which was for them, not for the court.

Several errors are assigned upon rulings of the court on certain motions to strike out portions of the pleadings. The action was replevin and came to the district court on appeal from a justice of the peace. The plaintiff in his petition added an allegation of conversion of the property in connection with a claim for value of its use. This was not stated in form as a separate cause of action, and seems to have been merely incidental to the claim for damages which was not improper in such a case. At any rate, though redundant and immaterial, it did not necessarily attempt to state a different cause of action and was not open to a motion to strike it out based solely on the latter ground. Nor do we think the court erred in striking out a portion of defendant's answer. In addition to a general denial, the answer set up a number of affirmative defenses. It is probable that all of these might have been stricken out, since everything making against plaintiff's cause of action was provable under the general denial. *Schrandt v. Young*, 62 Neb., 254 86 N. W. Rep., 1085. At any rate the paragraphs in question set up matters which, if available in any way in an action of replevin, were so only as they went to plaintiff's right to sue at all, and hence required no plea beyond the general denial.

The brief of counsel contains the following statement:

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"Counsel calls attention to the ruling upon the question of evidence set out in the 16, 17, 18, 19, 20, 21, 22, and 23d assignments of error and, asking that they be considered together, insist that all these matters were material and entitled to go to the jury." We have had occasion heretofore to protest against briefs of this sort, and must do so again. The labor involved in making out what is complained of, the reason and basis of the complainant, and the exact portions of the record material thereto should fall on counsel, not on us. We have here a record which alone probably cost the parties as much as the whole sum involved in the case. If they desired to carry on this litigation in another court, they ought not to have been economical of printer's ink at the last moment. We are not bound to examine questions not fairly raised in the briefs, and we do not think the questions of evidence referred to are so raised.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

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JOHN H. MOCKETT, JR., ET AL. V. BOSTON IMPROVEMENT  
COMPANY ET AL.

FILED FEBRUARY 6, 1902. No. 12,347.

Commissioner's opinion. Department No. 1.

**Contracts: CONSTRUCTION.** Certain written agreements examined and construed to mean that when J. H. M., Jr., and F. E. M. made certain payments upon a note of \$1,593.40 and reduced it to \$1,050 they should be released from further liability upon the note.

**ERROR** from the district court for Lancaster county.  
Tried below before HOLMES, J. *Reversed.*

*Clark & Allen*, for plaintiffs in error.

*Wilson & Brown*, contra.

**Mockett v. Boston Improvement Co.**

DAY, C.

This action was brought in the district court for Lancaster county by the Boston Improvement Company against John H. Mockett, John H. Mockett, Jr., and Fred E. Mockett, to recover a balance alleged to be due upon a promissory note executed and delivered by the defendants to the First National Bank and by the bank transferred to the plaintiff. In obedience to a peremptory direction of the court, the jury returned a verdict in favor of the plaintiff upon which judgment was subsequently rendered, to review which the defendants, John H. Mockett, Jr., and Fred E. Mockett have brought the case to this court on proceedings in error. John H. Mockett made no appearance in the action. The defense interposed by John H. Mockett, Jr., and Fred E. Mockett was that they were merely sureties on the note; that the debt for which the note was given was the obligation of John H. Mockett and was contracted years prior to the date of the note sued upon; that at the time of the execution of the note it was agreed and understood that they should be released and discharged from further liability thereon when the debt had been reduced to the sum of \$1,050.

The evidence tended to show that on August 4, 1898, the defendants, John H. Mockett, Jr., and Fred E. Mockett, applied to the First National Bank for a loan of \$1,500. At that time John H. Mockett was owing the bank \$1,593.40. Arrangements were on that date perfected by which the desired loan was made to the defendants, John H. Mockett and Fred E. Mockett, and as a part of that transaction the defendants, J. H. Mockett, Jr., and F. E. Mockett, with their father, signed the note which is now the subject of this controversy. It also appeared that an agreement was made with reference to certain payments upon the notes which was reduced to writing. This writing was introduced in evidence by the defendant as Exhibit "B" and was as follows:

"Whereas, J. H. Mockett, J. H. Mockett, Jr., and F. E.

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Mockett have this day borrowed from the First National Bank \$1,500 payable with ten per cent. interest from date as follows: \$250, September 12, 1898; \$250, October 12, 1898; \$250, November 12, 1898; \$250, December 12, 1898, and \$500, January 12, 1899. And have also made a written agreement secured by an assignment of their contract with the Northwestern Mutual Life Ins. Co. to pay upon a certain promissory note of J. H. Mockett the following sums: \$100, February 12, 1899; \$100, March 12, 1899; \$100, April 12, 1899; \$100, May 12, 1899; \$100, June 12, 1899, and \$50, July 12, 1899 or until the said note of J. H. Mockett, Sr., shall be reduced to \$1,050 with all interest paid. Now therefore the said bank agrees that when the above conditions are complied with and the said amounts as above specified are paid to release the said assignment and return the same with the said contract to the said J. H. Mockett, J. H. Mockett, Jr., and F. E. Mockett. Executed at Lincoln, Nebraska, August 4, 1898. D. D. Muir, president."

There was also a memorandum indorsed upon the back of the note in suit as follows: "When J. H. M., Jr., and F. E. M. quit paying on this note or any renewal of it, it is to be cut down to \$1,050 and all int. paid up to that time."

It was contended by the answering defendants that by this indorsement when the note was reduced to \$1,050 their liability thereon should cease. The sole question presented by the record is whether the agreement between the parties as contained in the three instruments, to wit, the note, the memorandum on the back thereof and Exhibit B, was that the answering defendants should be liable for the whole sum of \$1,593.40 with interest, or only for the amount in excess of \$1,050. The construction of written contracts when their terms and the meaning of such terms is not in dispute is for the court. It is impossible for us to see how full meaning can be given to all the terms of these agreements and construe the transaction as an unconditional agreement on the part of the

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answering defendants to pay the full amount of the note. The effect of all the writings when taken together, as they must be, seems to us to be that if the payments recited in Exhibit "B" were made upon the note for \$1,593.40, together with the sum of \$1,500 newly borrowed, then J. H. M., Jr., and Fred E. M. should be permitted to quit paying. If these payments were not made as agreed they were to be bound for the whole debt. It is not claimed that there was any default in meeting these payments. Such being the case it would seem that the answering defendants were discharged.

In our view the court should have directed a verdict for the answering defendants. We therefore recommend that the judgment be reversed.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

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THE STATE OF NEBRASKA, EX REL. THE PLATTSMOUTH  
TELEPHONE COMPANY, RELATOR, V. JACOB FAWCETT,  
RESPONDENT.

FILED FEBRUARY 6, 1902. No. 12,473.

Commissioner's opinion. Department No. 3.

**Injunction:** DISSOLUTION UNDER STATUTE. A subsequent order, which in no degree relaxes the restraint imposed by a temporary injunction, is not a dissolution or modification thereof, within the meaning of section 679 of the Code of Civil Procedure.

Original application in this court for a mandamus to compel the respondent to fix the amount of a supersedeas bond. *Writ denied.*

*Byron Clark*, for relator.

*James H. Van Dusen*, contra.

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ALBERT, C.

The Plattsmouth Telephone Co. filed a petition in the district court for Douglas county, praying for a temporary injunction, to restrain the city of South Omaha and its officers, "from in any manner interfering with plaintiff's transaction of its business in said city of South Omaha, either by cutting its wires, leased from the Postal Telegraph Co., removing its instruments, arresting its employees, or in any other manner." On an *ex parte* showing, the following order, allowing a temporary injunction, was made by one of the judges of said court:

"This cause came on for hearing upon the bill of complaint of the plaintiff verified positively, and was submitted to me, on consideration whereof it is ordered that an injunction be granted herein enjoining the defendant, the city of South Omaha, its mayor, A. R. Kelly, its chief of police, Miles Mitchell, and its street commissioner, Frank Clark, and all other officers and employees of said city, from in any manner interfering with the telephone business of the plaintiff, The Plattsmouth Telephone Company, either by cutting its wires leased from the Postal Telegraph Cable Company, removing its instruments, arresting its officers and employees or from obstructing or prohibiting the receiving and sending of messages over its said leased wires in any manner until the further order of this court; this order to take effect upon the plaintiff executing and delivering to the clerk of the district court an undertaking to the defendants in the sum of \$1,000, with approved sureties, conditioned as required by law. This writ returnable before Hon. Chas. T. Dickinson on the 7th day of November, 1901."

Afterward, the defendants filed an answer and a cross-petition, the latter praying a temporary injunction, restraining the plaintiff "from in any manner proceeding to enter upon the streets and alleys of the defendant city, for the erection of poles and stringing of wires, or the maintaining of either therein, and from conducting wires, for the purpose of prosecuting the telephone business, into

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buildings within said city, or from transmitting electric currents over wires, either leased or owned by said plaintiff, within said city limits, or operating, conducting or carrying on any telephone business within said city." A hearing was had on the defendants' application for an injunction whereupon the court entered an order, allowing a temporary injunction, substantially as prayed in its cross-petition. The order is as follows:

"On this day came on to be heard the motion and application of said defendants for a temporary injunction, and was argued by counsel, and the court upon consideration thereof and being fully advised in the premises does order that the said motion and application be and hereby is sustained, and that upon the said defendants filing with the clerk of this court a bond for the sum of \$1,000, conditioned according to law with sureties to be approved by said clerk, the said plaintiff, its officers, agents, employees and servants, and all persons or corporations acting for said plaintiff or in the interest of or on behalf of said plaintiff with notice or knowledge of this order be and they are hereby enjoined from in any manner constructing, reconstructing, building or operating a telephone system within the corporate limits of the city of South Omaha, or changing the condition of its wires or instruments or extending the scope of its business from the condition in which such wires and instruments and business were at the time the temporary order of injunction was granted herein against said defendants by Hon. B. S. Baker, Judge, on the application of said plaintiff on the 26th day of October, 1901, said condition at such time being found by the court to be that the wires of the plaintiff have been removed from the poles and its instruments disconnected therefrom, thereby rendering it at such times impossible to transmit messages by telephone from within the corporate limits of South Omaha to any other point within said limits or outside of such corporate limits, to which finding, and order of the court, the said plaintiff duly excepts."

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The plaintiff, proceeding on the theory that the second order was a dissolution or modification of the first, then asked the court to fix the amount of a supersedeas bond, in order that the plaintiff might give such bond, whereby the injunction first issued would be kept in full force and effect until the final hearing of the cause, in accordance with the provisions of section 679 of the Code of Civil Procedure. The request was denied, and the plaintiff now applies to this court for a writ of mandamus to compel the respondent, as one of the judges of said district court, and the one who presided at the hearing of the defendants' application for an injunction, to fix the amount of such bond.

It is conceded that if the injunction, granted on the prayer of the defendants, dissolves or modifies that granted on the prayer of the plaintiff, the plaintiff, who is the relator in this proceeding, is entitled to an order fixing the amount of the bond required to keep its injunction in full force and effect, pending a final hearing in the district court, and, consequently, that a peremptory writ should issue herein. The orders relate to the same property, and their relation to each other will better appear from the following:

The first order restrains the defendants from: 1. Interfering with plaintiff's telephone business by, (a) cutting its leased wires; (b) removing its instruments; (c) arresting its officers or employees. 2. Obstructing or prohibiting the receiving and sending of messages over its leased wires.

The second order restrains the plaintiff from: 1. Constructing, reconstructing, building or operating a telephone system in South Omaha. 2. Changing the condition of its wires or instruments or extending the scope of its business from the condition they were in at the time of the issuance of the first injunction.

We are unable to see how the second order operates, in any degree, as a dissolution or modification of the first. The first, as well as the second, is purely prohibitive. It



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gives the plaintiff no right to do any act it could not lawfully have done without such order. Its sole purpose was to restrain the defendants from doing the acts therein specified. The restraint, thereby imposed on the defendants, has been no less effective since the issuance of the second order than it was before. The second order, in no degree, relaxes the restraint imposed by the first. That being true, the second order can not be said to operate as a dissolution or modification of the first. It follows that the district court properly refused to fix the amount of a supersedeas, and that the writ prayed should be denied. It is recommended that the writ be denied.

AMES and DUFFIE, CC., concur.

WRIT DENIED.

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THE WARDER, BUSHNELL AND GLESSNER CO. v. ISAAC MYERS ET AL.

FILED FEBRUARY 19, 1902. No. 10,842.

Commissioner's opinion. Department No. 3.

**Vendor and Purchaser: BREACH OF AGREEMENT TO REPAIR: DAMAGES.**

In an action by the vendor of a harvesting machine to recover the purchase price, breach of an agreement by the plaintiff to put the machine in repair so that it will do good work in the following season, does not entitle the defendant to recoup, as damages, the loss occasioned by the injury to his grain by reason of its not having been harvested in due season.

ERROR from the district court for Webster county. Tried below before BEALL, J. *Reversed.*

*George R. Chaney*, for plaintiff in error.

*Overman & Blackledge*, contra.

AMES, C.

This action was begun by a petition in the usual form to recover upon a promissory note executed to the plaintiff by the defendant, Myers, as principal, and the de-

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fendant, Fogg, as surety. The answer after admitting the execution and delivery of the note, pleads two defenses thereto. First, that previously to the making of the note the defendant, Myers, had purchased a harvesting machine from the plaintiff upon a warranty which had wholly failed, and that the machine at the time of giving the note was "wholly disabled for harvesting purposes," and that as a consideration for the note the plaintiff agreed that it would at its own expense "repair the machine and put it into condition to do the ordinary work of a grain harvesting machine of like kind," or else would accept a return of it and surrender the note, and that the plaintiff had wholly neglected and refused to keep this agreement and the machine was useless for harvesting purposes. Second, that in reliance upon the above recited agreement the defendant had, after the giving of the note in suit, planted a crop of grain which had been lost on account of his inability to harvest it "because of the defect of said machine and its incapacity for the work of cutting and binding grain," and that by reason of the premises the defendant had been damaged to the extent of \$95. It was further alleged that at the time of the making of the note in suit and as a part of the same transaction and upon the same consideration, the defendant had given the plaintiff another note, which had been, before the breach of the agreement, satisfied by the payment of \$31.25. The answer concluded with a prayer for a judgment against the plaintiff for the sum of these two items, \$126.25, and costs of suit. The reply is in substance a general denial of the new matter contained in the answer. The trial resulted in verdict and judgment for the defendant for the sum of one dollar, and the plaintiff brings the case here by petition in error.

In this state of the pleadings the defendant was permitted to introduce, over the objection of the plaintiff, evidence as to the extent in which his grain was injured by reason of its not having been harvested in proper season nor until after it became overripe, the delay having been

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occasioned, as it was alleged, by the inefficiency of the machine in question. The admission of this evidence was clearly erroneous. It is an item of damage which cannot be supposed to have been within the contemplation of the parties when the agreement pleaded in the answer was made, and it was too remote to be properly submitted to the consideration of the jury.

Since the case must be tried again it may be proper to say that there is a large mass of testimony in the record with reference to an alleged warranty upon which the machine was purchased, and as to whether and to what extent there has been committed a breach of the same, or a waiver thereof, that under the issues as framed is immaterial and irrelevant and should have been excluded. The pleadings on neither side were drawn with a degree of skill and precision that could be desired, but the principal real issue seems to be whether a controversy between the parties about the inefficiency of the machine and the liability of the defendant to pay an overdue balance of the purchase price for it, was settled and adjusted by the giving of the note in suit and the other note afterwards paid, and by the contemporaneous agreement pleaded in the answer. The evidence should be confined to the decision of this issue and to the legal consequences following the manner of its determination. If the agreement was made and broken in the manner alleged in the answer and the defendant has been guilty of no breach thereof on his part, there can be no recovery on the note in suit and the defendant is entitled to recover the money paid upon the smaller note. If the alleged agreement was not made, or if made it has not been broken, the defense pleaded utterly fails. There is no issue tendered or properly triable concerning any previous contract.

It is recommended that the judgment of the district court be reversed and a new trial granted.

**ALBERT and DUFFIE, CC., concur.**

**REVERSED AND REMANDED.**

Davies v. Barker.

CHARLES K. DAVIES, APPELLANT, v. S. M. BARKER ET AL.,  
APPELLEES.

FILED FEBRUARY 19, 1902. No. 10,969.

Commissioner's opinion. Department No. 1.

**Appeal and Error: CONFLICTING EVIDENCE.** A finding based on conflicting evidence will not be disturbed unless manifestly wrong.

APPEAL from the district court for Merrick county.  
Tried below before HOLLENBECK, J. *Affirmed.*

*John Patterson*, for appellant.

*W. T. Thompson*, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Merrick county by Charles K. Davies against S. M. Barker and others on the 9th day of November, 1898, to set aside a conveyance of real estate made by M. W. Milliman and wife to Nelson B. Dolson, on April 15, 1897, the conveyance being alleged to have been made without consideration and in fraud of creditors. The petition is in the usual form in such cases. An answer was filed by Milliman and wife and Dolson and wife, admitting the recovery of the judgment against Milliman and others mentioned in the petition, and the conveyance of their real estate, but alleged that such conveyance was made in good faith and for a good and valuable consideration, and not in fraud of creditors. To this answer a reply was filed by plaintiff, appellant. Trial was had which resulted in a finding and judgment dismissing appellant's petition, from which judgment an appeal is prosecuted to this court.

The only contention of counsel for appellant is that the judgment is not supported by sufficient competent evidence. The facts disclosed by the record are, that M. W. Milligan and certain other sureties, signed a supersedeas

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bond with S. M. Barker, upon which suit was finally brought, which resulted in a judgment against all the parties to the bond. Summons in that case was served upon M. W. Milliman on the 13th day of April, 1897, and on the 15th day of April, 1897, he made the conveyance in question to Nelson B. Dolson, his son-in-law. The undisputed testimony of both Milliman and Dolson shows that the sale of the premises in question was really made some months before the conveyance; that Dolson held a note for \$850 against his father-in-law, Milliman, for borrowed money, which was past due. A small amount of this obligation had been paid. Milliman owned the quarter section of land in question, which was subject to a mortgage, the principal of which was \$800, and there was in accrued interest and back taxes on the land about \$125. Milliman was anxious to pay the debt to his son-in-law, and offered to sell him the farm for \$1,600. Dolson finally agreed to take the farm at this price, and in payment therefor surrender the \$850 note which he held, giving his father-in-law a note for \$371 and paid in cash about \$70. Subsequently the parties discovered that a mistake of \$100 had been made in the settling of their mutual accounts, and this \$100 was indorsed on the \$371 note, thus reducing it to \$271. Milliman was indebted to his sister-in-law for \$200 borrowed money and put this note up with her as collateral security. No part of this testimony is impeached, and it seems to be entitled to full credit. There is an abundance of testimony supporting the finding and judgment of the trial court. In fact, under the evidence in the record, the finding could not have been otherwise than it was. The rule is settled that a judgment of the trial court based on conflicting evidence will not be reversed, unless clearly wrong. This judgment appears to be right, and it is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

**First Nat. Bank of Harvard v. Hockett.**

**THE FIRST NATIONAL BANK OF HARVARD V. BENJAMIN F.  
HOCKETT ET AL**

**FILED FEBRUARY 19, 1902. No. 10,993.**

**Commissioner's opinion. Department No. 2.**

1. **Injunction: ACTION ON BOND: ATTORNEYS' FEES AS DAMAGES.** Where attorneys' fees are sought to be recovered as damages in a suit on an injunction bond it is incumbent upon the plaintiff to show either that injunction was the only relief asked in the suit, or, that the fees were paid solely for the purpose of procuring a dissolution of the injunction as distinguished from fees paid for the trial of the principal issues involved in the case.
2. **Injunction Against Judgment: DELAY IN COLLECTION: MEASURE OF DAMAGES.** Where the collection of a judgment is enjoined and one of the elements of damage sought to be recovered is for delay in its collection, the proper measure for this element of damage is additional court costs, if any, and interest at the rate which the judgment draws during the time of such delay.
3. **Evidence: VALUE OF LAND: AUTHORIZED BID.** In proving the value of land at a particular time it is not competent to show what a witness says he was authorized to bid for the land at that time; and the fact that he claims to have been authorized to bid for a party financially responsible would not change the rule.

**ERROR** from the district court for Clay county. Tried below before HASTINGS, J. *Affirmed.*

*Thomas H. Matters*, for plaintiff in error.

*Hurd & Spanogle, contra.*

**OLDHAM, C.**

This was a suit for damages on an injunction bond. The exact nature of the relief sought in the original injunction proceeding does not fully appear from the pleadings filed in this case, nor were the original pleadings in the injunction proceeding introduced in evidence by either of the litigants. It does appear, however, that the defendants had enjoined plaintiff from selling on execution certain real estate owned by defendants situated in Clay county, Nebraska. It also appears that no motion to dissolve the

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temporary injunction, originally issued, was ever made by the plaintiff in this cause of action, but that said cause was finally determined on general demurrer to the defendants' bill for equitable relief. It also appears that after the injunction had been dissolved by the district court a supersedeas bond was filed by the defendants in this cause of action, and error proceedings were instituted in this court for review of the judgment and that this error proceeding was dismissed before the present suit was commenced. On issues thus joined plaintiff had judgment for \$24.60 and now brings error to this court.

The first alleged error called to our attention in plaintiff's brief was as to the action of the trial court in excluding from plaintiff's measure of damages the amount claimed for attorneys' fees in procuring a dissolution of the injunction. Plaintiff in its petition alleged that it had expended \$100 for attorneys' fees in procuring a dissolution of the original injunction. This allegation was denied by defendants' answer; and defendants alleged that plaintiff's attorney was employed by the year to generally attend to all of plaintiff's business. The evidence introduced by plaintiff tended to show that it had paid \$100 for attorneys' fees in the defense of the suit in which the injunction was issued. The question then arises: Is plaintiff entitled to recover attorney fees in a suit on an injunction bond where the record is silent as to what issues were involved in the injunction case, and where no motion appears to have been made to dissolve the temporary injunction? Now it has been held by this court in the recent case of *Cunningham v. Finch*, 63 Neb., 189, that: "A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only ancillary to the main case." And this case supports the doctrine announced in *Trester v. Pike*, 60 Neb., 510, 83 N. W. Rep., 676. It would seem to be a fair deduction from this rule that where attorney fees are sought to be recovered as damages in a suit on an injunction bond it is in-

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cumbent on the plaintiff to show either that injunction was the only relief asked for in the suit, or, that the fees were paid solely for the purpose of procuring the dissolution of the injunction as distinguished from fees paid for the trial of the principal issues involved in the case.

In *Reece v. Northway*, 12 N. W. Rep. [Ia.], 258, the court held that in the absence of evidence showing that an injunction was not the only relief sought it was not error for the trial court to exclude plaintiff's claim for attorneys' fees.

In *Leonard v. Capitol Insurance Company*, 70 N. W. Rep. [Ia.], 629, it was held that in an action to vacate a judgment and to enjoin an execution thereon the injunction is merely incidental to the main relief sought.

We think, that in view of these authorities that to entitle plaintiff to recover for attorneys' fees, as a proper element of its damage, it should have shown what the issues were in the original injunction suit, and if it could not show that injunction was the only relief prayed for, it should then have shown that the fee sought to be recovered was paid solely for the purpose of procuring a dissolution of the injunction and for no other service rendered in the suit. Plaintiff having failed to make this proof we do not think the court erred in excluding this item of damage from the consideration of the jury.

It is next complained that the court erred in excluding from the plaintiff's measure of damage the reasonable rental value of the lands on which the execution was issued during the injunction proceedings. Instead of submitting this measure the court declared the measure of damage for delay to be the cost and interest accruing on the judgment during the time its execution was enjoined. Accumulating costs and interest on the judgment during the delay occasioned by the injunction clearly and accurately defines plaintiff's measure of damage, and the court therefore gave the correct rule applicable to damage occasioned by delay.

It is next urged that the court erred in excluding plain-



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tiff's offer to prove that at the time the sale was enjoined the cashier of plaintiff's bank was authorized by the bank to bid \$2,000 for the land and would have done so if the sale had not been enjoined. The court excluded this offer and permitted the plaintiff to show by its cashier that in his judgment the land was reasonably worth \$1,800 at the time the first sale was enjoined. This evidence was offered for the purpose of showing the value of the land at the time the sale was enjoined and the court held, and we think rightly, too, that in proving the value of land at a particular time it is not competent to show what a witness says he was authorized to bid for the land at that time; and the fact that he may have been authorized by a party financially responsible would not change the rule.

These are all the alleged errors seriously called to our attention in plaintiff's brief. Plaintiff made no request for instructions and those given by the trial court appear to have been sufficient to fairly and fully submit all the issues to the jury.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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WOLCOTT W. ELLSWORTH ET AL., APPELLEES, v. RALPH C. TOOKER ET AL., IMPEADED WITH BERNARD A. McDOWELL, APPELLANT.

FILED FEBRUARY 19, 1902. No. 11,027.

Commissioner's opinion. Department No. 3.

Judicial Sale: APPEAL FROM CONFIRMATION: No QUESTION INVOLVED.

APPEAL from the district court for Sherman county. Tried below before GRIMES, J. *Affirmed.*

*R. J. Nightingale*, for appellant.

*L. J. Hall* and *T. S. Nightingale*, contra.

Blanchard, Shelly & Rogers v. Logan County.

DUFFIE, C.

This is an appeal from an order confirming a sale presenting no questions of public interest or disputable legal proposition. The record discloses a sale made at the place appointed by statute, and regular in all particulars. The order appealed from should be affirmed, and we so recommend.

AMES and ALBERT, CC., concur.

AFFIRMED.

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BLANCHARD, SHELLY & ROGERS V. THE COUNTY OF LOGAN.

FILED FEBRUARY 19, 1902. No. 11,029.

Commissioner's opinion. Department No. 3.

1. **Taxation: LIEN.** A statutory lien for taxes due exists upon all personal property of the tax debtor (within the county) from and after the tax lists are made and delivered to the county treasurer.
2. **Taxation: LIEN: PRIORITY OF MORTGAGE LIEN.** A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches.
3. **Taxation: LIEN: SALE OF PROPERTY COVERED BY PRIOR MORTGAGE.** Where a sheriff levies distress warrants for delinquent taxes for several years upon property of the tax debtor upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent, and for the years, the mortgage lien is prior and superior to the lien for delinquent taxes.

ERROR from the district court for Logan county. Tried below before GRIMES, J. *Reversed.*

*McCoy & Olmstead*, for plaintiffs in error.

*Neville & Parsons*, contra.

AMES, C.

On September 21, 1894, the plaintiffs in error, who were also plaintiffs below, sold a herd of cattle situate in Buffalo county to one George Diehl, a resident of Logan

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county, this state, and as security for part of the purchase price took from the purchaser his note and a mortgage on the cattle, and consented that the property should be removed by the purchaser to the county of his residence, which was forthwith done, and the mortgage made duly of record in that county. On November 20, 1895, a part of the cattle having been sold and there still remaining unpaid of the mortgage debt a large sum of money, the sheriff of Logan county seized six head of the animals upon a distress warrant issued by the county treasurer for general personal property taxes levied against Diehl for the years 1892, 1893, 1894, and 1895. The cattle were thereupon taken in replevin by the plaintiffs in error, and after a trial by the court without a jury, judgment was rendered for the defendant, assessing the value of his interest at the amount called for by the tax warrants. There was no controversy in the court below with respect to the validity and amount of the mortgage of the plaintiffs, nor, although some question is attempted to be raised for the first time in this court, concerning the technical sufficiency of the plaintiffs' proofs, do we think there is any question that the instrument was valid as a lien upon the property for the security of the plaintiffs' debt. It is quite clear that the judgment of the trial court is exclusively the expression of his opinion that the tax liens are superior to the mortgage lien, treating the latter as valid. It is equally clear that in view of the decision of this court in *Chamberlain Banking House v. Woolsey*, 60 Neb., 516, announced since the judgment, that opinion was erroneous. None of the tax levies for 1892, 1893, and 1894, could have attached to the cattle while they were yet the property of the plaintiffs and situate in Buffalo county and they became charged with the mortgage lien at the instant that the title passed to the purchaser and before they were removed to Logan county. Subsequent personal taxes levied against the mortgagor were, of course, subject to the mortgage.

Rutland Savings Bank v. Pargeter.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

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THE RUTLAND SAVINGS BANK, APPELLEE, v. ROSE E.  
PARGETER ET AL., APPELLANTS.

FILED FEBRUARY 19, 1902. No. 11,042.

Commissioner's opinion. Department No. 2.

Mortgage Foreclosure.

APPEAL from the district court for Sherman county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Wall & Williams*, for appellants.

*A. B. Coffroth*, contra.

OLDHAM, C.

The same question is involved in this case as that involved in the case of *Rutland Savings Bank v. O'Bryan*, *post*, page 519, and for the reasons therein stated it is recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

Rutland Savings Bank v. O'Bryan.

THE RUTLAND SAVINGS BANK, APPELLEE, v. ETTA C.  
O'BRYAN ET AL., APPELLANTS.

FILED FEBRUARY 19, 1902. No. 11,043.

Commissioner's opinion. Department No. 2.

**Mortgage Foreclosure: OBJECTIONS TO CONFIRMATION: TIME ORDER OF SALE ISSUED.** A mortgagor in a foreclosure proceeding can not object to the confirmation of sale because the order of sale was issued before the priorities of the different lienors had been determined, as he has no rights involved in this question.

APPEAL from the district court for Sherman county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Wall & Williams*, for appellants.

*A. B. Coffroth*, contra.

OLDHAM, C.

This is an appeal by the mortgagors from an order of confirmation of sale in a foreclosure proceeding. The only objection urged to the regularity of the sale is that the order of sale was premature because it was issued before the priorities of the different mortgages had been determined by the court. The record shows that a decree of foreclosure had been rendered on each of the several mortgages before the order of sale was issued, and consequently all rights between the mortgagor and mortgagees were finally settled by these decrees; hence the only parties interested in the question of the priorities of the different liens are the lienors themselves and they are not complaining.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

**WILLIAM DEERING & Co. v. DAVID CLAYPOOL ET AL.**

**FILED FEBRUARY 19, 1902. No. 11,046.**

**Commissioner's opinion. Department No. 3.**

**Pleading: CONTRACT: ALLEGATION OF PERFORMANCE.** A petition, based on a contract which fails to allege performance on the part of the plaintiff, or facts showing a valid excuse for non-performance, is fatally defective.

**ERROR from the district court for Dawson county.**  
**Tried below before WESTOVER, J. *Affirmed.***

*H. D. Rhca* and *O. P. Davis*, for plaintiff in error.

*E. D. Owens and George W. Fox, contra.*

**ALBERT, C.**

This case was tried in the county court on a petition worded as follows:

**“William Deering & Co., a Corporation,  
v.  
David Claypool & William Claypool, etc.”**

“Plaintiff for cause of action alleges that by virtue of certain written commission agency contracts dated November 23, 1887, and January 24, 1888, defendants at their request, became the agents of plaintiff at the town of Cozad, Dawson county, Nebraska, for the years 1887 and 1891 inclusive. A copy of said contract is hereto attached marked Exhibit ‘A’ and defendants by such agency contract did handle and sell the following named goods, to-wit: harvesters and binders and reapers, mowers, trucks and other attachments and extras for said machinery; that the aggregate amount received by said defendants from plaintiff was \$1,443.47 of which there has been paid the sum of \$1,033.28, and there is yet due the sum of \$410.19. Itemized statement of such account is hereto attached marked Exhibit ‘B’ part hereof.

**“Plaintiff further alleges that the items of credit com-**

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mencing with June 9, 1891, and thereafter as shown in Exhibit 'B' were made on collateral given by the defendants to the plaintiff as security on the cause of action sued on and that it was collected on the day the credit was given therefor as marked Exhibit 'B.' A description of said collateral is hereto attached marked Exhibit 'C' a part hereof. The plaintiff therefore prays judgment against the defendants for the sum of \$410.19 and interest at the rate of 7 per cent. per annum from the 21st day of July, 1897."

We omit the exhibits mentioned in the petition, because of their unusual length. As to them, it will suffice to say, that the first two show a contract between the plaintiff and the defendants, whereby the latter became the agents of the former, for the sale of certain farm implements, within certain territory, in this state, on commission.

In the county court the defendants interposed an objection to the introduction of any testimony on behalf of the plaintiff, on the ground that the facts stated in the petition were not sufficient to constitute a cause of action. The objection was overruled. Thereupon a trial was had, resulting in a finding and judgment for the plaintiff. The defendants prosecuted error to the district court, asking a reversal of the judgment of the county court, assigning as error the ruling on their objection to the sufficiency of the petition. The district court reversed the judgment, and, from such judgment of reversal, the plaintiff brings the case here on error.

There is no error in the judgment of the district court. The petition is fatally defective, in one particular at least. Plaintiff sought to recover on an alleged contract, whereby itself and the defendants respectively undertook and agreed to do and perform certain acts. There is no allegation to the effect that the plaintiff has kept and performed its part of such contract, nor of any fact showing a valid excuse for the non-performance thereof. That such omission is fatal, is elementary.

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Harrison v. Hancock.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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JAMES N. HARRISON V. JOHN D. HANCOCK.

FILED FEBRUARY 19, 1902. No. 11,057.

Commissioner's opinion. Department No. 3.

**Contracts: QUANTUM MERUIT: CONTRACT AS EVIDENCE.** Although goods are sold or services rendered under an express contract fixing the price for them, an action may be maintained for their reasonable value. In such cases the plaintiff abandons the contract and waives any damages resulting from its breach, and his recovery can not exceed the contract price, but the contract may be given in evidence by either party as tending to prove the value.

ERROR from the district court for Burt county. Tried below before BAKER, J. *Reversed.*

*H. E. Carter*, for plaintiff in error.

*W. G. Sears*, contra.

AMES, C.

This is an action upon a *quantum meruit* to recover the reasonable value of the services to the defendant of certain animals belonging to the plaintiff. Upon the trial there was some evidence tending to show that a price for the services in question had been fixed by an oral contract between the parties at or before their rendition. The plaintiff then offered to prove the reasonable value of the services, but upon objection the evidence was excluded and the court instructed the jury to return a verdict for the defendant, which was done. This was erroneous upon two grounds: first, the question whether there was a contract or not, if material, was a question of fact which the plaintiff was entitled to have the jury decide and he had, therefore, a right to prove the measure



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of recovery embraced in the issues; and, second, it is well settled that although goods are sold or services rendered under an express contract fixing the price for them, an action may be maintained for their reasonable value. In such cases the plaintiff abandons the contract and waives any damages resulting from its breach, and his recovery can not exceed the contract price, but the contract may be given in evidence by either party as tending to prove value. *Gillies v. Manhattan Beach Imp. Co.*, 26 N. Y. Supp., 381; *Keogh Mfg. Co. v. Eisenberg*, 27 N. Y. Supp., 356; *Kick v. Doerste*, 45 Mo. App., 134.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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WILLIAM P. CHAMBERS, EXECUTOR OF THE ESTATE OF  
NATHAN P. RICE, DECEASED, APPELLEE, v. GEORGE E.  
BARKER, APPELLANT, ET AL.

FILED FEBRUARY 19, 1902. No. 11,059.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: CONSTRUING PETITION AFTER JUDGMENT.** A petition will be construed liberally when attacked for the first time after judgment.
2. **Vendor and Vendee: NECESSITY OF SIGNATURE OF VENDEE TO CONTRACT OF SALE.** Where a vendor signs a written agreement to sell and convey real property and the vendee accepts the same and goes into possession under it, there is a complete contract between the parties and it is not necessary that the vendee sign also, although the instrument is so worded as to indicate that his signature was contemplated.
3. **Receiver: NOTICE OF APPLICATION: "PARTIES TO BE AFFECTED" UNDER STATUTES.** The "parties to be affected thereby" who are required to be notified of an application for appointment of a receiver of real property under section 267, Code of Civil Procedure, are those having an interest in the possession of the property in controversy or its immediate custody, and in the immediate disposition of rents, issues or profits accruing therefrom.

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4. Receiver: PLEADING: SUFFICIENCY OF AVERMENTS NOT DENIED.

Where a verified application for the appointment of a receiver in foreclosure proceedings avers that the property in controversy is insufficient to pay the sums for which it is liable, and such averment is nowhere denied or controverted, a finding accordingly is sufficiently sustained and an order appointing a receiver is proper.

APPEAL from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*B. N. Robertson*, for appellant.

*V. O. Strickler*, contra.

POUND, C.

This suit was brought to foreclose a contract for the sale of land. A decree of foreclosure was rendered, and after decree a receiver was appointed on application of the plaintiff. The decree and the order appointing the receiver are appealed from.

So far as complaint is made with reference to the findings of personal liability, in anticipation of deficiency judgment, there is grave doubt whether the objections are not premature. *Parmelee v. Schroeder*, 59 Neb., 553. But we think the objections to the decree are without merit in any case. It is well settled that a petition will be construed liberally when attacked for the first time after judgment. The petition alleges an agreement to sell the property in dispute, the execution of a written agreement for that purpose by the vendor and its delivery to the vendee at his request, and there are other allegations from which it is a clear inference that the vendee is in possession. Although the instrument as drawn evidently contemplates signature by both parties, when the vendee accepted it and went into possession under it the contract became complete. He cannot hold the property by virtue of it and yet pretend that it is incomplete and that he is not bound by its terms. This is not a case of a mere offer or an option. The petition alleges that the agreement was made between the parties and that the

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written instrument was executed and delivered to the vendee at his request by the vendor. The case is on all fours with *Robinson v. Cheney*, 17 Neb., 673, 679. Moreover, the evidence shows that the vendee recorded the instrument, and also tends to show that he made some payments under it. The decree should be affirmed.

Objection is made to the order appointing a receiver on two grounds. First, it is said that the wife of the vendee, who was made a defendant because of some claim made by her as such wife, should have been notified of the application. But we think it very clear that the "parties to be affected thereby," who are required to be notified of an application for appointment of a receiver of real property under section 267, Code of Civil Procedure, are those having an interest in the possession of the property or its immediate custody, and in the immediate disposition of rents, issues and profits accruing therefrom. Here it appears that the vendee had leased the premises and was receiving the rents. His wife, whatever contingent or inchoate interest she may have had in the property itself, had no interest in the possession of the property or the disposition of the rents. There was no occasion to serve her with notice. It is also objected that the evidence does not sustain the order appointing the receiver. The verified application for appointment of a receiver avers that the property is insufficient security for the sums due. Such averment is nowhere denied or controverted. We think this affords a sufficient basis for the finding and order of the lower court.

We therefore recommend that the decree and order appealed from be each affirmed.

BARNES AND OLDHAM, CC., concur.

**AFFIRMED.**

Ramser v. Johnson.

JACOB RAMSER, APPELLEE, v. ANNA JOHNSON, APPELLANT,  
ET AL.

FILED FEBRUARY 19, 1902. No. 11,060.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: CONTENTS OF NOTICE OF SALE.** There is no requirement of the statute that the notice of sale under a decree of foreclosure shall contain a statement that the sale is to be made under a decree of foreclosure.
2. **Mortgage Foreclosure: APPEAL FROM CONFIRMATION: APPRAISAL OF DEFENDANT'S INTEREST.** A defendant appealing from an order confirming a judicial sale of land can not be heard to complain that his interest was not singled out for appraisement, where the appraisement was of the total value and also the appraisement of the "defendant's interest."

APPEAL from the district court for Lancaster county.  
Tried below before FROST, J. *Affirmed.*

*Frederick Shepherd*, for appellant.

*F. A. Boehmer*, contra.

DAY, C.

This is an appeal from an order confirming the sale of certain real estate made in pursuance of a decree of foreclosure rendered by the district court for Lancaster county, Nebraska. Prior to the sale certain objections were filed by the defendants, but as they relate solely to proceedings not presented in the record brought to this court they can not be considered. After sale objections were filed to the confirmation. One of the grounds urged is that the sale was to be made under a decree of foreclosure, as distinguished from an execution sale. There is no requirement of the statute that the notice of sale under a decree of foreclosure shall contain a statement that the sale is to be made under a decree of foreclosure. An examination of the notice of sale published shows that it complies with all the requirements of the statute.

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It is also urged that the appraisal is defective in that the property is not described therein as the property of the defendant, Anna Johnson, who it is claimed is the owner of the premises, and that the interest therein appraised is not stated to be the interest of Anna Johnson as distinguished from the other defendant. It appears from the record that Anna Johnson and Nels Johnson were wife and husband, that they were the defendants in the action, that they executed the note and mortgage which formed the basis of this decree and that they resided upon the premises sought to be sold. In the condition of this record there is nothing to indicate but that the defendants are joint owners of the premises and in that event the action of the appraisers in appraising the "interest of the defendants" at the sum named is entirely in harmony with appellant's argument. No showing is made that Anna Johnson was the sole owner of the premises. As against some showing to the contrary the presumption is in favor of the regularity of the appraisal. The proceedings of the appraisers show that the total value of the premises was appraised and the interest of the defendants was also appraised; in such case a defendant can not be heard to complain because his interest was not singled out and appraised separately. *Toscan v. Devries*, 57 Neb., 276.

No substantial reason has been pointed out why the sale should not be confirmed. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

Stafford v. Harmon.

MARY E. STAFFORD, APPELLEE, v. LUTHER A. HARMON,  
APPELLANT.

FILED FEBRUARY 19, 1902. No. 11,061.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: APPEAL FROM CONFIRMATION: AFFIRMATIVE ERROR.**  
To require the reversal of an order confirming a sale of property under a decree of foreclosure, error must affirmatively appear from the record.
2. **Evidence: APPRAISAL: PRESUMPTION OF FRAUD.** Evidence examined, and *held* to show that the appraisal of the property was not so low as to raise a presumption of fraud, and, further, to be insufficient to show that the appraisers were not disinterested freeholders.

APPEAL from the district court for Douglas county.  
Tried below before EVANS, J. *Affirmed.*

*C. W. DeLamatre*, for appellant.

*B. F. Thomas*, contra.

KIRKPATRICK, C.

This is an appeal from an order confirming a sale made by the district court for Douglas county on the 20th day of May, 1899. Two objections to the order of confirmation are urged by counsel for appellant in brief, and the others, in accordance with well settled rules, will not be considered. It is contended, first, that the appraisal of the property sold was too low, and was so low as to raise a presumption of fraud; second, that the appraisers called by the sheriff were not disinterested freeholders within the meaning of the law. A motion to set aside the appraisal was made before the sale, which, however, was not brought to the attention of the trial court until after the sale was made. Objections to the confirmation and a motion to set aside the sale were then made, and the motion to vacate the appraisal and the objections to the sale, and a motion to vacate and set aside the

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sale, were all considered at the same time by the trial court.

In support of the objection that the property was appraised so low as to raise a presumption of fraud, the affidavits of four residents of Douglas county were filed, which placed the value of the property at from \$5,500 to \$6,000. The property was appraised by the sheriff and the appraisers at \$4,500. There seems to be no merit in this contention.

It is next urged that the appraisers called by the sheriff were not disinterested freeholders, but were what are denominated "professional appraisers." In support of this objection an affidavit is filed by the attorney for appellant which sets out that he examined the sale book kept by the sheriff in his office, and that he found that one of the appraisers called had served as an appraiser for the sheriff twenty-four times, and that the other freeholder called had served thirty-five times. The period of time during which the appraisers had acted this number of times does not appear from the record, and we are unable to determine whether they were called this number of times in one day, one month or one year. The practice on the part of the sheriff, if it be shown to exist, of having two or more persons act as appraisers for long periods of time and in a great many cases can not be too severely condemned. If the same persons are so repeatedly and frequently called as appraisers as to make the fee that they receive an inducement to them to act, and amount to such a sum as prevents them from being disinterested freeholders as contemplated by the statute, then the sheriff violates his oath of office in calling such appraisers, and it would be the duty of the trial court upon investigation to set aside appraisements so made. We are unable to say, however, from the evidence preserved in this record that this is such a case, so as to require a reversal of the order of confirmation. It is very well settled law, that errors, in order to call for a reversal of the judgment of the trial court, must be made

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affirmatively to appear. In this case it does not so appear. It is the duty of the trial court to guard jealously the rights of parties whose property is being sold by the processes of the court and to see that their rights are not violated by the appraisers of the court. We presume the trial court did its duty in the case at bar, and that the appraisal and sale were legally and fairly made. It is therefore recommended that the order of confirmation made by the trial court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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O. C. RANDALL V. THE PHELPS COUNTY MUTUAL HAIL  
INSURANCE ASSOCIATION.

FILED FEBRUARY 19, 1902. No. 11,064.

Commissioner's opinion. Department No. 2.

1. **Mutual Insurance: PREMIUM NOTE: DEFENSE OF NO SURETY.** A member of a mutual insurance company who has given a premium note thereto can not defend an action upon such note on the ground that he was not required to furnish a surety upon the note as provided by the rules of the company.
2. **Mutual Insurance: EMPLOYMENT OF SOLICITORS AS DEFENSE TO PREMIUM NOTE.** Violation of the statute prohibiting employment of solicitors by a mutual hail insurance company is for the state to complain of, and is not available to a member as a defense to an action upon his premium note.

ERROR from the district court for Phelps county. Tried below before BEALL, J. *Affirmed.*

*C. H. Roberts*, for plaintiff in error.

*E. W. Reed*, contra.

POUND, C.

This is an action upon a premium note given to a mutual hail insurance company. The lower court directed



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a verdict for the plaintiff company, and error is prosecuted by the defendant. The principal errors assigned relate to rulings on evidence. We do not think it necessary to pass on the abstract correctness of these rulings in point of law for the reason that we regard the alleged defenses to which they are pertinent as without merit. One of the rules of the company required members to furnish sureties upon their premium notes. It appears that at the time of the transaction in question personal security was felt to be hard to obtain and of doubtful value in the community where the company did business and the directors voted to take chattel security instead, but the resolution was not entered by the secretary. Defendant's objection is that the company permitted him and others to furnish chattel security instead of personal security as required by the rule on the books. The rule requiring personal security, being for the benefit of the company, and of its own making, could be waived. *Stoehlke v. Hahn*, 158 Ill., 79, 42 N. E. Rep., 150. The company waived it and was precluded from objecting thereafter on that ground. But this estoppel must be mutual. Defendant can not be a member for the purpose of being insured and yet not a member when sued on the note. As to the other point, that the company employed solicitors contrary to the provisions of the statute, we need hardly say that the violation of law in this respect was for the state to complain of and was not available to defendant in an action on his premium note. *First National Bank v. Grosshans*, 61 Neb., 575, 85 N. W. Rep., 542. Defendant cites *State v. Moore*, 48 Neb., 870. But that case is not in point. It was an application for a writ of mandamus to compel the auditor to issue a certificate authorizing a mutual company to do business in the state. Here the state is not prosecuting, nor the auditor refusing to permit the company to do business while it continues its unwarranted practice. The statute does not make every member of the company a common informer to hold it to the strict line of its duty nor reward

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his zeal in that behalf by relieving him from his dues and liabilities.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

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ANTHONY LOAN & TRUST CO., APPELLEE, v. AGNES FIORELLI,  
APPELLANT.

FILED FEBRUARY 19, 1902. No. 11,070.

Commissioner's opinion. Department No. 3.

**Process:** CONCLUSIVENESS OF RETURN. Where, upon the face of his return to a writ, it appears that the officer executing it duly performed his duty and that the same was executed according to law, in the absence of a showing to the contrary, such return is conclusive.

APPEAL from the district court for Douglas county.  
Tried below before EVANS, J. *Affirmed.*

*Louis J. Piatti*, for appellant.

*F. A. Brogan*, contra.

ALBERT, C.

This is an appeal from an order confirming a sale of real estate in foreclosure proceedings. The only grounds urged in the brief, against the order of confirmation, are those growing out of the appraisal. The objections to the appraisal relied upon are, first, that no copy thereof was filed in the office of the clerk as required by law; second, that no oath was administered to the appraisers to impartially appraise the premises. These objections were lodged before sale, but were not passed upon until afterward, when the case came on for hearing on the return of the sheriff on the order of sale, when they were overruled and the sale confirmed. The return of the sheriff shows that a copy of the appraisal was duly filed

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in the office of the clerk of the district court, and that such appraisal was made after the appraisers had been sworn "impartially to appraise" the premises sold. The return is not contradicted by affidavit or other evidence of record in this case. The bill of exceptions contains nothing save the decree, order of sale, appraisal and other matters which were properly in the record before the bill of exceptions was allowed. Under such circumstances it adds nothing, except in bulk, to the record and is superfluous. On the record presented the trial court could not do otherwise than confirm the sale.

It is recommended that the order of confirmation be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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CHARLES S. TAYLOR, APPELLEE, v. URBAN REIS ET AL., IM-  
PLEADED WITH BESSIE KAVAN ET AL., APPELLANTS.

FILED FEBRUARY 19, 1902. No. 11,083.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: RETURN OF ORDER WITHIN SIXTY DAYS.** Failure of the sheriff to return an order of sale pursuant to decree of foreclosure within sixty days of its issuance is no sufficient reason for withholding confirmation of a sale made thereunder.
2. **Mortgage Foreclosure: APPRAISAL: MISTAKE IN VALUATION.** An appraisalment of real estate for the purposes of judicial sale, duly made, can not be assailed on the sole ground that the appraisers were mistaken in their valuation of the property.

APPEAL from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

*Louis Berka and John D. Ware, for appellants.*

*F. A. Brogan, contra.*

POUND, C.

This is an appeal from an order confirming a sale of real property pursuant to a decree of foreclosure. Two

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objections are argued, both of which have been disposed of repeatedly by this court. Failure of the sheriff to return the order of sale within sixty days of its issuance, the first ground of complaint, was no reason for refusing confirmation. *Amoskeag Savings Bank v. Robbins*, 53 Neb., 776; *Philadelphia Mortgage & Trust Co. v. Buckstaff Bros. Mfg. Co.*, 61 Neb., 54, 84 N. W. Rep., 411. As to the objection to the appraisement, it is well settled that an appraisement, duly made, will not be set aside merely because the appraisers were mistaken in their valuation. *Nelson v. Alling*, 58 Neb., 606; *Lockwood v. Cook*, 58 Neb., 302; *Omaha Loan & Trust Co. v. Fitzpatrick*, 59 Neb., 303. We recommend that the order of confirmation be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

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WILLIAM F. BONAWITZ, SHERIFF OF JEFFERSON COUNTY, V.  
MARGARET DE KALB.

FILED FEBRUARY 19, 1902. No. 11,096.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: CONFLICTING EVIDENCE.** The verdict of a jury on testimony fairly conflicting will not be disturbed by this court.
2. **Appeal and Error: VERDICT: INSTRUCTIONS.** Verdict examined, and *held*, not in conflict with instructions.
3. **Trial: JUDGE RECALLING JURY TO GIVE RECOLLECTION OF TESTIMONY.** While it is permissible for the trial court after a jury is sent out to deliberate on its verdict to recall it and give his recollection as to the testimony on a point in dispute in the presence of or after notice to the parties or their counsel, yet this practice has never been looked upon with favor by this court.
4. **Appeal and Error: INSTRUCTIONS.** Instructions examined, and *held* pertinent to the issues involved in the case.

ERROR from the district court for Jefferson county.  
Tried below before STULL, J. *Affirmed.*

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*John Heasty and C. H. Denney, for plaintiff in error.*

*W. H. Barnes, contra.*

OLDHAM, C.

This was an action in replevin. The only question involved is as to the ownership of the property replevied. The defendant, sheriff, took possession of the property under an execution issued against Thomas J. De Kalb, husband of the plaintiff. Plaintiff claims the property as her separate, statutory estate. Plaintiff had judgment in the court below and defendant brings error.

It is contended that the verdict should be set aside as being clearly against the weight of the evidence. But an inspection of the testimony as contained in the bill of exceptions convinces us that there was much competent, affirmative testimony introduced tending to show that plaintiff, Margaret De Kalb, was the owner of the property in controversy, and, although this testimony was met by opposing testimony offered by the defendant below tending to discredit it, it nevertheless presented an issue of fact which was peculiarly within the province of a jury to determine.

It is next insisted that the verdict is contrary to the instructions of the trial court, and particularly paragraph seven of instructions given by the court at the request of defendant below. While this instruction presented the case in a manner very favorable to the contention of plaintiff in error and stated the law, as we think, too strongly in his favor, yet it left the jury to determine from the evidence whether or not Margaret De Kalb "and her husband so conducted and handled the property that the public in general believed that the property belonged to the husband." Now, as we have already pointed out, there was conflicting testimony in the record on this question, and hence the finding of the jury should not be disturbed.

It is further contended that the court erred in not

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giving the jury further instructions after it had retired and deliberated for some time and sent the following written request to the trial judge: "Your honor, we would like to have further instructions on this case. If there was any evidence that Thomas J. De Kalb ever owned any personal property, the most of us don't know it." This request appears to have been declined. The action of the trial court in recalling a jury and giving it further instructions after it has once retired for deliberation lies in the sound discretion of the trial judge; and unless the record discloses a manifest abuse of this discretion in this matter such action will not be reviewed by this court. Here the request was one for information on the testimony introduced, and while it is permissible for the court, after a jury has been sent out to deliberate on its verdict, to recall it and give his recollection of testimony in dispute, this practice has never been looked upon with great favor by this court. *Jameson v. State*, 25 Neb., 185; *Darner v. Daggett*, 35 Neb., 695; *McClary v. Stull*, 44 Neb., 175; *Bartell v. State*, 40 Neb., 233.

It is lastly contended that the court erred in giving three instructions requested by the defendant in error. It is conceded by counsel for plaintiff in error that each of the instructions given properly declares the law; but it is contended that these instructions are not pertinent to the issues involved in this case. Each of the instructions complained of dealt with the right of a married woman, under the laws of the state of Nebraska, to own and control personal property separate and apart from the property owned by her husband. We think that these instructions were not only correct, as abstract propositions of law, but were plainly applicable to the issues involved in this case.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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ANDREW G. NELSON, APPELLANT, V. HARLAN COUNTY,  
NEBRASKA, ET AL., APPELLEES.

FILED FEBRUARY 19, 1902. No. 11,114.

Commissioner's opinion. Department No. 3.

**Eminent Domain: APPRAISAL OF DAMAGES BY BRIDGE COMMITTEE:**  
EFFECT. A landowner filed a claim for damages for land proposed to be taken for a public highway. Instead of having his damages appraised by three disinterested electors appointed by the clerk, the matter was referred to the bridge committee of the board of supervisors, and this committee awarded him \$75. *Held*, That in the exercise of the right of eminent domain the statute should be strictly followed, and that the appraisement of damages by a committee of the board which was to settle and determine the amount to be allowed was such a departure from the method of ascertaining the plaintiff's damage as to invalidate the proceeding.

APPEAL from the district court for Harlan county.  
Tried below before BEALL, J. *Reversed with directions.*

*John Everson*, for appellant.

*R. L. Keester* and *A. M. Beresford*, contra.

DUFFIE, C.

On July 12, 1898, a petition was filed with the county clerk of Harlan county, praying for the establishment of a public road "commencing at the northwest corner of section twelve (12), township two (2), range twenty (20), thence running southeast terminating at the half section line of said section twelve (12), thence east to the township line." No question is made as to the sufficiency of the petition. On July 16, the county clerk appointed a commissioner to examine the proposed road and he reported in favor of its establishment. On August 9 following, the plaintiff, Andrew G. Nelson, filed his claim for damages in the sum of \$600. No appraisers were appointed by the county clerk to examine and report upon these damages, but on October 25, 1898, the board of supervisors referred the matter of the damages to the bridge committee of the

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board, and that committee made a report favoring the allowance of \$75. Steps were thereafter taken referring the matter of the payment of these damages to the trustees of Sappa township, the road in question being located in that township. Sometime in January, 1899, the trustees of Sappa township reported to the board of supervisors their willingness to pay \$50 of the damages awarded to Nelson, and thereupon the county board passed an order as follows: "On motion of Elliott the prayer of the petitioners was granted and road ordered opened, providing Road District No. 22 shall pay said \$50 damages within twenty days."

We gather from the record that Sappa township paid into the county treasury the sum of \$50 which was tendered to Nelson as damages, which amount he refused to accept, and thereupon Ed. Goudie, the supervisor of roads, proceeded under the directions of the board of county supervisors to open the road, whereupon Nelson, the appellant, brought this action against the county, the supervisors thereof, and Goudie, praying an injunction to prevent them from taking or in any manner appropriating the land of the plaintiff for use as a public highway or interfering with plaintiff's possession of the land. Harlan county and the board of supervisors demurred to the petition alleging as one ground of the demurrer that "they were not proper parties defendant in said action." This demurrer was sustained by the district court, and this is one error complained of upon the appeal.

In *Hodges v. Board of Supervisors*, 49 Neb., 666, it was held that, "A county board is not a proper party defendant in an action to enjoin the opening of a highway." The reason for the rule is fully stated by NORVAL, J., and need not be repeated here. While the form of the demurrer might not technically raise the question, still as no action could be maintained against the county or its board of supervisors, the mere fact that the demurrer was defective in form is not error requiring a reversal of the case.



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Goudie, the road supervisor, filed an answer, and upon the issues thus joined, the case was tried and a decree entered ordering a dissolution of the temporary injunction theretofore allowed upon the payment to the plaintiff of the sum of \$75 within ten days from the entry of the decree, and in case of non-payment of said sum, the injunction to stand until paid. We have some doubts as to whether the decree in the form that we find it in the record constitutes a final judgment from which an appeal will lie. There is no order dismissing the plaintiff's bill upon the payment of damages awarded by the court. The only order made is that upon the failure to pay these damages the temporary injunction shall continue in force. This would seemingly continue the case for further consideration by the court, but as both parties have proceeded in the case upon the assumption that the decree entered was a final disposition of the case, we will dispose of it upon that theory.

In his answer, the defendant, Goudie, alleges that a road along substantially the same lines as the one now under consideration was established in the year 1885, and that such road has been in use by the public from that time to the present; and the claim is made that the public are entitled to a right of way by prescription, even if no road had been legally established. We do not consider it necessary to examine the evidence relating to the establishment of a road by prescription. The plaintiff and appellant claimed damages on account of his land being taken for the opening of the road in question. His right to damages was recognized, and damages were awarded. We do not think, in this condition of the case, that the defendant can now be heard to say that he was not entitled to damages or that none of his land was being appropriated by this new proceeding.

The appellant complains because appraisers were not appointed to assess the damages sustained by him on account of the establishment of this road. Section 4528, Compiled Statutes, 1901, is as follows: "When claims

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for damages are filed and on the day appointed for filing the same, the county clerk must appoint three suitable and disinterested electors of the county as appraisers, to view the ground on a day fixed by him, and report upon the amount of damages sustained by the claimants; such report shall be made and filed in the clerk's office within thirty days after the day they are appointed." Section 4533 makes it the duty of the supervisors to examine the question of damages reported by the appraisers and they may increase or diminish the amount reported as in their judgment and from the evidence before them they may think right and proper. They constitute the court or tribunal by which the claimant's damage is, in the first instance, determined and settled, and we can not think that the law is complied with by referring the appraisal of damages to a committee of the board which is finally to pass upon that question instead of to three disinterested electors as provided by statute.

In *Currier v. Marietta R. Co.*, 11 Ohio St., 228, it is said: "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain—one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property." In *Sharp v. Johnson*, 4 Hill [N. Y.], 92, the rule was stated as follows: "When lands are taken under statutory authority, in derogation of the common law, every requisite of the statute having a semblance of benefit to the owner must be strictly complied with."

Because the statute was not observed in the appointment of appraisers to assess the plaintiff's damages and because these damages were appraised and assessed by members of the court or body before whom the question of his damages was to be tried, we recommend a reversal of the decree of the district court, and that the case be

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remanded with directions to enter a decree making the temporary injunction perpetual; this decree, however, not to operate as a bar to further proceedings to establish the road in question by proper proceedings taken thereafter.

AMES and ALBERT, CO., concur.

The decree of the district court is reversed, and the case remanded with directions to enter a decree making the temporary injunction perpetual; this decree, however, not to operate as a bar to further proceedings to establish the road in question by proper proceedings taken thereafter.

REVERSED WITH DIRECTIONS.

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EDWARD D. JONES, APPELLEE, V. MARGARET CLEARY ET AL.,  
APPELLANTS, ET AL.

FILED FEBRUARY 19, 1902. No. 11,116.

Commissioner's opinion. Department No. 1.

1. **Judgment: CONFIRMATION: REGULARITY PRESUMED.** Regularity of the trial court in passing upon a motion to confirm a sale will be presumed until overcome by affirmative proof in the record.
2. **Bills of Exceptions: RULES OF PRACTICE.** The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions.
3. **Mortgage Foreclosure: OBJECTION OF FRAUD IN APPRAISAL: PRESUMPTION: EVIDENCE OF VALUE.** An appraisement objected to on the ground that it is fraudulent, where no actual fraud is shown, must be supported by evidence as to value, between which and the appraised value the discrepancy is so great as to raise a presumption of fraud; otherwise the objection can not be sustained.

APPEAL from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*W. H. De France*, for appellants.

*Tibbets Bros., Morey & Anderson*, contra.

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KIRKPATRICK, C.

This is an appeal from an order of confirmation made by the district court for Douglas county on the 17th day of June, 1899, confirming a sale of mortgaged property made by the sheriff of that county. But two questions are presented for consideration in brief of counsel, and no others will be considered. Appellants contend, first, that the trial court erred in overruling the motion made to set aside the appraisement by the sheriff and the freeholders because the property was appraised too low; and second, that the court erred in confirming the sale when no motion had been made and filed in writing as required by the rules of the district court for Douglas county, and that appellants had no notice of the order confirming the sale as required by the rules of practice in said court.

In support of their objections to the appraisal and the motion to vacate the sale, appellants filed the affidavits of five persons, residents of Douglas county, each of whom placed the value of the property at \$8,000. In support of the appraisal and the confirmation of the sale, appellee filed affidavits of eight persons residing in Douglas county, who valued the property at sums ranging from \$3,900 to \$6,000. The property was appraised by the sheriff at \$6,000. It is the settled rule of practice in this state that an appraisement such as that in the case at bar is final unless fraud is shown. *Brown v. Fitzpatrick*, 56 Neb., 61; *Iowa Loan & Trust Company v. Stimpson*, 53 Neb., 536; *Northwestern Mutual Life Insurance Company v. Mulvihill*, 53 Neb., 538. There seems to be no merit in this contention of appellants. The next contention is that no motion in writing was filed for the confirmation of the sale, and that appellants had no notice of the filing of such motion. Attached to the transcript in this case is a copy of the rules of practice or bar rules of the district court of Douglas county, requiring that motions for the confirmation of sales shall be in writing, etc. Such rules of practice, in order to be available for the determination

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of any question presented in this court, must be preserved by the bill of exceptions, which was not done in this case. *State v. Scott*, 59 Neb., 499. But even if they were properly before this court, the objection seems to be wholly without merit. Appellants appeared at the time the order of confirmation was made, offered their affidavits in support of their contention that the appraisement was too low; had their motion to vacate the appraisal and the sale duly passed upon, and took their exceptions to the actions of the trial court. The trial court, in confirming the sale, recites that a motion for confirmation was filed. This record imports absolute verity, and if incorrect, appellants should have moved for a correction. *State v. Hopewell*, 35 Neb., 822; *Merchants Savings Bank v. Noll*, 50 Neb., 615. There can be no doubt that the trial court supposed a motion for confirmation of sale to have been duly filed, and if appellants had called the attention of the court to the absence of such motion, doubtless the trial court would have required its filing. This appellants failed to do, and they can not now be heard to complain. Appellants do not seem to have been in any way prejudiced by the action of the trial court, and it is therefore recommended that the order of confirmation made by the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

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HARRISON H. BLODGETT V. IVER JENSEN.

FILED FEBRUARY 19, 1902. No. 11,159.

Commissioner's opinion. Department No. 1.

1. **Pleading: DAMAGES: SUFFICIENCY OF ALLEGATIONS.** Allegations in petition, 1st, of lease by plaintiff from defendant of lands as meadow; 2d, of actions brought successfully against plaintiff by a third party to recover for the grass taken from the land by plaintiff; 3d, of notice to this plaintiff in error of such actions and re-

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quest to defend, and, 4th, of payment of judgments and costs in such actions by plaintiff, *held*, to show a cause of action.

2. Appeal and Error: EVIDENCE: DAMAGES. Evidence examined and *held* to show ample facts to sustain findings of trial court.

ERROR from the district court for Lancaster county. Tried below before FROST, J. *Affirmed*.

*H. H. Blodgett, pro se.*

*Clark & Allen, contra.*

HASTINGS, C.

But two questions are raised in this action in any event. It is claimed by defendant in error that there are none. The errors assigned are: 1st, not sustaining demurrer to second amended petition; 2d, finding for plaintiff when it should have been for defendant; 3d, judgment contrary to law and evidence in the case; 4th, error in admitting the transcript of judgment in justice court of Saunders county; 5th, error in permitting oral testimony as to the issues in such justice court; 6th, errors of law duly excepted to; 7th, error in admitting transcript of judgment of justice of the peace in the present action; 8th, allowing damages in excess of \$50, the consideration of the lease, and, 9th, overruling motion for new trial. The last two questions are not urged in the brief of plaintiff in error. As to the 4th, 5th, 6th and 7th the action was heard to the court without the intervention of a jury, and if there is sufficient material testimony they need not be considered. The objection that the judgment is contrary to the law and the evidence in the case will be considered as an objection to the sufficiency of the evidence to sustain the finding, though it is very doubtful whether it ought to be so considered. The objection to the sufficiency of the evidence is not specific, and it is impossible to tell from the objection whether the complaint is as to the finding of fact or the conclusions of law of the trial court.

An examination of the record discloses an admission

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in defendant's answer that on June 4, 1892, he leased to the plaintiff below, defendant in error here, 160 acres of land in Saunders county, from the 4th of June to the 4th of November, in the same year, and received \$50 paid in advance from the plaintiff, Jensen. It was grass land and stipulated to be used "for mowing purposes only." About July 10, when Jensen commenced cutting his grass, he found about twenty acres of it already cut by one Yates, and upon his attempting to remove some of the hay himself, it was replevied from him by Yates, who claimed to have a prior lease for the same premises from defendant, Blodgett. Blodgett was notified of the pendency of the action and told plaintiff to hold possession, that he was all right and would be protected, and that Yates had no claim. Yates recovered judgment for the hay replevied, which is testified to have been worth about \$9, and the costs in that action, \$19. After this judgment, plaintiff was still instructed to go on and cut the hay and proceeded to do so, and in November, 1894, suit was brought against plaintiff for the hay by Yates, and a judgment recovered for \$125 and costs of suit taxed at \$7.20. Of this action also the defendant was notified. No denial is attempted of the lease to plaintiff nor of payment of \$50 rent, nor of receipt of notice by defendant of both the actions brought by Yates against the plaintiff. It clearly appears that plaintiff paid both judgments. The findings of the trial court in favor of plaintiff in the sum of \$200 are sustained by sufficient evidence. Defendant does not deny telling plaintiff to retain the premises, cut the hay, and he would be protected. The amounts paid out by plaintiff and interest make a sum considerably greater at the time of the trial in district court than the amount found, viz., \$200. The allegations of the petition set forth these facts as a basis of recovery, and it is recommended that the judgment of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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C. A. SCHRANDT ET AL. V. WILBER E. YOUNG.

FILED MARCH 5, 1902. No. 10,541.

Commissioner's opinion. Department No. 1.

1. **Contracts: CARING FOR SHEEP: BREACH: MEASURE OF DAMAGES.** In an action brought by plaintiff to recover damages for a breach of contract, whereby he was to receive as compensation for caring for a flock of sheep, one-half of the increase and one-half of the wool clip, *held*, that plaintiff was entitled to recover for such profits or advantages, the direct and immediate fruits of his contract as were lost by such breach of contract on the part of the defendant.
2. **Contracts: BREACH: EXPERT TESTIMONY OF INCREASE AND WOOL-CLIP OF SHEEP.** That prospective gains arising from the probable increase of the flock and the probable wool-clip are not so uncertain and contingent as to prevent proof by experts of the amount and value of such increase and wool-clip.
3. **Trial: LIMITING ARGUMENTS TO JURY: DISCRETION OF COURT.** It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed. *Dixon v. State*, 46 Neb., 298.

ERROR from the district court for Sheridan county. Tried below before SULLIVAN, J. *Affirmed*.

*Robert Lucas and Albert W. Crites*, for plaintiffs in error.

*W. W. Wood*, *contra*.

DAY, C.

In the district court for Sheridan county Wilber E. Young recovered a judgment against C. A. Schrandt and others for \$450 for a breach of a contract of agistment. To review this judgment the defendants have brought the case to this court on error.

There is no dispute that the plaintiff and defendants entered into a written contract on December 16, 1895, by which the plaintiff agreed to take and keep on shares for a period of three years, 771 ewes and 10 rams belonging



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to the defendants. As compensation for his services the plaintiff was to receive one-half of the increase of said sheep after first making good all the losses, and also was to receive one-half of the entire wool-clip. The contract contains a great many stipulations as to the manner of feeding, handling and breeding said sheep, which we deem unnecessary to be set out. Pursuant to the contract the plaintiff took possession of said sheep and commenced to carry out the conditions of the contract. The plaintiff claims that some months after taking possession of said sheep he complained to the defendants that many of the ewes were old and toothless and totally unfit to be kept during the period of the contract for breeding, and that on October 16, 1896, an oral agreement was entered into between the parties whereby the plaintiff was to feed and prepare for market 529 of the old ewes, for which extra service and feed furnished, the plaintiff was to receive \$200, and upon the delivery of the old ewes to the defendants the defendants were to furnish to the plaintiff an equal number of young ewes, to be kept by him under the terms of the written contract. The evidence is clear that the plaintiff fed the 529 old ewes a large quantity of hay, corn, oats and barley, and on November 27, 1896, at the request of the defendants, delivered said sheep to the defendants who received them and sold them upon the market. The defendants did not pay the plaintiff the \$200, or any part thereof, for the feed and care of said sheep and did not furnish him with any young ewes in lieu of the 529 old ones, by reason of which the plaintiff claims he has been damaged in the loss of the increase of said sheep and the wool-clip therefrom during the balance of the period of the contract. The defendants deny the making of the oral contract and claim that the plaintiff in feeding said ewes was carrying out the terms of the written contract. They also charge mismanagement on the part of the plaintiff and violations of his contract by virtue of which they had the right to and did terminate it.

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There are 116 assignments of error arising upon the introduction of evidence and the instructions of the court. In fact, there is hardly a question to which exception was taken which is not assigned as error. We can see no useful purpose in attempting to group them and answer the objections made. Suffice it to say that they do not appear to us to have been prejudicial. The principal question involved in the case, as we view it, arises upon the objections of the defendants to the plaintiff's testimony, as to the probable increase of the 529 ewes for the remaining period of the contract and the value thereof, and the probable wool-clip from these ewes and their increase, and its value. The defendants insist that this evidence was incompetent because the damages sought to be shown were too remote, speculative and conjectural to form the basis of any recovery.

In the leading case of *Masterton v. Mayor of Brooklyn*, 7 Hill [N. Y.], 61, the court, after speaking of profits which were too remote, says: "But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement." So in the case at bar, the inducement to the contract was the contemplated profits or gains to be derived from the increase in the sheep and the wool-clip.

In *Shoemaker v. Acker*, 48 Pac. Rep. [Cal.], 62, the court, in discussing this question, says: "An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not

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consequences flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person, which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for in such a case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But, where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages."

In *Hoy v. Grenoble*, 34 Pa. St., 9, it is said, quoting from the syllabus: "In an action to recover damages for the breach of a parol contract, by which the defendant engaged to employ the plaintiff to cultivate a farm upon shares, the proper measure of damages is the profit which the plaintiff would have made on the farm if the contract had not been violated."

In *Western Union Telegraph Company v. Wilhelm*, 48 Neb., 910, it is said: "The general rule is that the party injured by breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach." *Griffin v. Colver*, 16 N. Y., 489. The same principle was recognized in *Wittenberg v. Mollyncaux*, 55 Neb., 429; *Shaw v. Hoffman*, 25 Mich., 162; *Fultz v. Wycoff*, 25 Ind., 321.

We think that the damages claimed in the case at bar are of the kind recognizable under the principle announced in the foregoing cases, and that they are not so contingent and uncertain as to prevent the amount from being established by proof with reasonable certainty. There is no good reason why one skilled in the business may not with a reasonable degree of accuracy be

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able to give the probable increase of a flock of sheep under certain stated conditions, as well as also the amount of wool which a flock of sheep under certain stated conditions would be likely to produce. To our mind such damages are no more contingent or uncertain than would be the damages resulting in a personal injury to a professional man, and yet the books are full of cases where such damages have been allowed, based upon the probable damages. Contracts for the purchase and sale of future crops running through a series of years have been recognized as valid. *Blackwood v. Cutting Packing Co.*, 76 Cal., 212. Actions have frequently been maintained for damages for the destruction of growing crops, although, of course, there was no certainty that the crops would have matured. 1 Sutherland, Damages [2d ed.], section 120, and cases cited.

The record shows that before the argument to the jury was commenced the court made an order limiting the time for argument to one-half hour on each side, to which ruling the defendants excepted and thereupon made a formal request for an hour and a half in which to present their side, which request was denied. This ruling is one of the errors complained of. There is nothing in the record to show that a half hour on each side was not sufficient time to argue the case, or that the time allotted to the defendants was consumed. The question here presented was before this court in *Dixon v. State*, 46 Neb., 298, in which it is said: "It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed."

After a careful reading of the record we are convinced that the numerous assigned errors were not prejudicial to the defendants. The jury, having adopted the plaintiff's theory of the case, we think might well have found under the evidence a verdict in his favor for a much larger

sum. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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PERCY A. WELLS V. JOHN C. FETZER.

FILED MARCH 5, 1902. No. 10,610.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: ASSIGNMENTS WITHOUT RULINGS OR EXCEPTIONS.**  
This court can not consider or pass upon assignments of error when the record fails to show any rulings on, or exceptions to, the matters complained of in the court below.
2. **Appeal and Error: EVIDENCE: ACTION ON NOTE.** Evidence examined, and held to be sufficient to support the judgment.

ERROR from the district court for Red Willow county.  
Tried below before NORRIS, J. *Affirmed.*

*P. A. Wells and S. A. Scarle, for plaintiff in error.*

*F. I. Foss and W. R. Starr, contra.*

BARNES, C.

On the 17th day of February, 1896, an action was brought in justice court of Red Willow county before the county judge acting as justice of the peace, on a promissory note signed by the plaintiff in error herein. The action was originally brought in the name of the Parlin, Orendorff & Martin Company, to recover \$174.88, balance due on the note above mentioned. It appears from the record that the note, when it was given, was for \$270, and payable to the order of Blue Hill Bank of Blue Hill, Nebraska, and that plaintiff in error had paid a part thereof, leaving a balance still due thereon. The plaintiff in error appeared and had the cause continued at his request. On the day to which the continuance was taken he made no appearance in court and judgment was rendered against

him. From that judgment he appealed to the district court for Red Willow county, and after his appeal was perfected, and some five months after the case had been docketed in the district court, he filed a motion to dismiss the case and reverse the judgment of the court below because the plaintiff had failed to file any petition in the district court as provided by law. From the transcript certified to this court it appears that no ruling was ever had upon this motion, but that afterwards, on the 5th day of November, 1896, one John C. Fetzer filed a petition in the case, on the note in suit, in his own name as plaintiff. No objection seems to have been made at the time, and in fact it appears from the record that on the 30th day of January, 1897, the plaintiff in error filed a motion asking the court to make an order requiring Euclid Martin and John C. Fetzer to be made parties plaintiff to the suit. An examination of the transcript shows that there was no ruling upon this motion, but it appears that from and thereafter the case proceeded in the name of John C. Fetzer, plaintiff, against P. A. Wells, defendant, who is the plaintiff in error herein. An answer was filed to which there was a reply, and the case was tried by the court without the intervention of a jury. The trial resulted in a judgment for the defendant in error, John C. Fetzer, and against the plaintiff in error herein, for the sum of \$210.56. A motion for a new trial was filed and overruled and the case brought, on petition in error, to this court.

The plaintiff assigns some nineteen grounds, or reasons, for a reversal of the judgment of the court below. An examination of the record, however, discloses that the only grounds set forth in the motion for a new trial were, first, the judgment is not sustained by the evidence; second, the judgment is contrary to law; third, errors of law occurring at the trial duly excepted to by the defendant; and fourth, that the court erred in not rendering judgment in favor of the defendant upon the law and fact.

1. It is the established rule of this court that no con-

sideration will be given to any assignments of error contained in the petition which were not set forth in the motion for a new trial. It follows then that the only errors which can be considered are the ones above mentioned. We might say that we have examined the record and find that no ruling was ever made and excepted to in all of the proceedings had on the trial in the court below, except the ruling on the motion for a new trial. It is doubtful, however, if any exception was saved to such ruling. This being true, the errors set forth in the petition and the plaintiff's brief, to wit, failure to dismiss the action for want of prosecution, for the reason that the plaintiff had not filed its petition within the time required by law; and that there was error in not sustaining the plaintiff's motion to make Euclid Martin and John C. Fetzner parties to the suit; and that the court erred in overruling his motion to strike the plaintiff's reply from the files, cannot be considered by this court for the reason that no ruling appears to have ever been made upon any of these motions, and of course there were no exceptions thereto. We hold, therefore, that the only question that can come before this court, if indeed we can consider such question, is the one as to whether or not the judgment is sustained by the evidence. We have concluded to examine the record and determine that question even if it be doubtful that there was any exception taken to the overruling of the motion for a new trial.

2. The testimony of the plaintiff in the court below, the defendant herein, is positive that he is the owner and holder of the note; that the balance claimed to be due thereon was due and wholly unpaid. The note itself was introduced in evidence, and, taken together with his testimony, there was sufficient evidence to entitle him to recover. The evidence introduced on behalf of the defendant fails to disclose a contrary state of facts. It was claimed, and evidence was introduced to attempt to show, that the plaintiff in error had signed the note in suit and delivered it to the Blue Hill Bank to settle an action that

was theretofore pending between it and one William H. Wells, a brother of the plaintiff in error, and that there was a stipulation or agreement that the suit should be dismissed and the bondsmen released in consideration of the note, whenever William H. Wells should pay the costs of the action. It is not shown, however, that the suit was ever further prosecuted, or that the bondsmen in fact were not released, or that William H. Wells had ever paid the costs, and was therefore entitled to a dismissal of the case. In fact the evidence was insufficient to establish a defense to the payment of the balance due upon the note in suit.

We hold that there was sufficient evidence to sustain the findings and judgment of the district court, and such judgment should be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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SCHOOL DISTRICT NO. 80 OF NEMAH COUNTY V. J. M.  
BURRESS ET AL.

FILED MARCH 5, 1902. No. 10,617.

Commissioner's opinion. Department No. 3.

1. **Officers: BREACH OF DUTY TO PUBLIC: ACTION BY INDIVIDUAL.** An individual has no right of action against a public officer for breach of a duty owing to the public only, even though such individual is specially injured thereby.
2. **Officers: COUNTY COMMISSIONERS: LEVYING TAX A PUBLIC DUTY: MISTAKE.** The duty imposed upon county commissioners under section 11, subdivision 2, chapter 79, Compiled Statutes, of levying the tax voted by a school district meeting and certified by the district board is one owing to the public only, and county commissioners who in good faith but by mistake levy a less tax than that voted are not personally liable to the school district.
3. **Officers: COUNTY CLERK: LEVYING TAX A PUBLIC DUTY: MISTAKE.** The like duty imposed upon the county clerk by section 77, article 1, chapter 77, Compiled Statutes, is one owing to the public only; hence a county clerk who by mistake omits to levy the tax reported in accordance with said section is not personally liable to the school district.



4. **Officers: COUNTY CLERK: APPORTIONING RAILROAD PROPERTY: LIABILITY FOR MISTAKE.** The duty imposed upon the county clerk by section 85, article 1, chapter 77, Compiled Statutes, of apportioning railroad property among the several school districts for purposes of taxation is one owing to the public only; hence a county clerk is not personally liable to a school district for an honest mistake in the apportionment.
5. **Officers: BREACH OF DUTY TO PUBLIC AND INDIVIDUAL: RIGHT OF INDIVIDUAL: MEASURE OF DAMAGES.** Where the duty of levying a tax is owing to some individual, as well as to the public, as in cases where the levy is directed by a court of competent jurisdiction for payment of a judgment, the measure of damage is not the amount of the tax which should have been raised, but only such actual damage as the individual entitled to recover has sustained, such as the expense incident to procuring the tax to be raised and any impairment of his claim by reason of failure to levy.
6. **Appeal and Error: REVERSAL TO RECOVER NOMINAL DAMAGES.** A judgment will not be reversed in order to permit recovery of nominal damages, unless recovery of such damages will establish or preserve some right or entitle the plaintiff to costs.

ERROR from the district court for Nemaha county.  
Tried below before STULL, J. *Affirmed.*

*G. B. Beveridge and B. Frank Neal*, for plaintiff in  
ERROR.

*E. Ferneau and W. H. Kelligar*, contra.

POUND, C.

In 1895, three contiguous school districts in Nemaha county, numbered 21, 22 and 27, were rearranged by cutting off a new district known as No. 80. A railroad traversed the territory of the old districts, and after the subdivision some two miles or more of said road were located in the new district. The county authorities, by mistake, omitted to levy upon this property at the rate voted by the school meeting in the new district, but instead levied at the rate voted by the old district in which the property originally lay, so that, while no part of the road entirely escaped taxation, the rate levied upon the two miles in question was considerably less than it should

have been. This action was brought by the school district against the county commissioners individually and the county clerk to hold them personally liable for the difference between the amount received by the district from the levy made and what it would have received had the levy been made properly and the railroad property duly apportioned. The district court directed a verdict for the defendants and rendered judgment accordingly, from which error is now prosecuted.

The duties of the county board and of the county clerk were without doubt purely ministerial so long as the levy voted by the school meeting and reported by the district board was within the legal limit. By section 11, subdivision 2, chapter 79, Compiled Statutes, it is required that the county commissioners levy a lawful tax voted by the meeting and certified by the district board, and if such tax is within the legal limit and is certified to the clerk prior to the first Monday in July, it is the county clerk's duty to make the levy under section 77, article 1, chapter 77, Compiled Statutes. It is also the duty of the county clerk under section 85, article 1, chapter 77, Compiled Statutes, to apportion railroad property among the several school districts for purposes of taxation. Performance of these duties and each of them could be compelled by mandamus. But it does not follow that these several officers are personally liable to the school district for honest mistakes or omissions in the discharge of these duties because such mistakes or omissions could have been prevented or corrected by mandamus. Officers whose duties are purely ministerial are not for that reason alone personally liable for injuries to individuals or corporations, public or private, growing out of their performance or non-performance thereof. Some of these duties are owing to the public only, and some to individuals as well, and the personal liability of the officer depends not only upon the nature of the duty but also upon the person or body of persons in whom the corresponding right inheres. For instance, the duty of the county clerk to file

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chattel mortgages or articles of incorporation duly tendered him for filing is a duty owing to the individuals by whom such instruments are tendered. On the other hand his duty to record the proceedings of the county board is one owing to the public only. In the one case, a right inheres in the individual injured; in the other, it is exclusively in the public. This clear and obvious distinction is the basis of the rules as to personal liability of officers to individuals for non-performance or improper performance of ministerial duties. An individual has no right of action against a public officer for breach of a duty owing to the public only, even though such individual is specially injured thereby. *McConnell v. Dewey*, 5 Neb., 385; *State v. Harris*, 89 Ind., 363; *Moss v. Cummings*, 44 Mich., 359; Cooley, Torts [2d ed.], 446; Mechem, Public Officers, section 598. Public prosecution is the sole remedy in such cases. *Bartlett v. Crozier*, 17 Johns. [N. Y.], 449. On the other hand, though there may also be a duty or even a primary duty to the public, if there is in addition a duty to and right in the individual, he may maintain an action. Mechem, Public Officers, section 672. And in such case it is no defense that the officer acted in good faith or under an honest mistake. *Amy v. The Supervisors*, 11 Wall. [U. S.], 136. But this principle must not be carried too far. Where the duty is one for performance of which the officer receives a fee from the person directly interested in its performance, as in case of service of process by the sheriff, recording of conveyances by the register of deeds, or filing of chattel mortgages by the county clerk, the case is clear enough. In other cases we must take into account the nature of the office, as well as the nature of the duty and interest of individuals in its performance, and must consider how far the public interest will be subserved by a right in individuals to hold the officer personally liable and how far the legislature may be regarded as having contemplated such result when it imposed the duty or created the office. Distinction must be made "between those officers

whose duties are of a general public nature, and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid.' Upon this distinction, it seems, the common law rule is founded, and is sustained by reason and principle, for in the one case, the officer acts for the public in general, and the manner in which he executes his trust is a matter between him and the public; but in the other he acts for the individual, for a reward emanating from him, and, therefore, the manner in which he performs his duty is a personal matter between him and the individual." *McConnell v. Dewey*, 5 Neb., 385. We are aware that in *Raynsford v. Phelps*, 43 Mich., 342, it was held by an eminent jurist that although a duty is imposed upon a tax collector primarily for the public benefit and on public grounds, if an individual has a direct and peculiar interest in its due performance, there is a duty to him enforceable against the officer personally. But this case was fully considered by another judge of recognized ability in the leading case of *State v. Harris*, 89 Ind., 363, and the court declined to adhere to it. It seems clear to us that the former decision goes too far. In general, the duty of levying and collecting taxes is imposed for the benefit of the public and is owing solely to the public. All claimants against a municipality and the county and all beneficiaries of appropriations have an interest, and often a very direct and special interest, in the levy and collection of the tax. But the law which requires these acts has in view the creation of a duty to the public, not a duty to these individual claimants and beneficiaries. Accordingly, we think the duties imposed upon the county commissioners and county clerk of levying the tax certified by the district board is one owing solely to the public, performance whereof is to be enforced by mandamus and breach whereof to be punished by public prosecution, and that an honest mistake or accidental omission in good faith while exercising these

duties creates no personal liability. Not only is this result in harmony with the conclusion in *State v. Harris, supra*, and the many cases there cited and discussed, but it has the support of a recent and well considered decision on much the same state of facts. *Board of Education of Bladen County v. Commissioners of Bladen*, 113 N. Car., 379, 18 S. E. Rep., 661. In that case, the county commissioners, acting in good faith and under a mistake, appropriated more than twenty-five per cent. of a capitation tax to the support of the poor, the constitution requiring three-fourths of such tax to go to the public schools. In a suit by the school district it was held that the commissioners were not liable either as individuals or as a corporation. We are also of opinion that the duty of apportioning railroad property among the several school districts in which it is located for purposes of taxation is one owing to the public only, out of which no right enforceable by action against the clerk personally arises so long, at least, as he acts honestly and in good faith. Undoubtedly each school district has a very real interest in the proper performance of this duty. But so have the proprietors of newspapers in the performance of the duties as to publication of notices and proceedings. And yet it is held that officers are not liable personally to the proprietor of a newspaper having the largest local circulation, or otherwise within the terms of the law, for not publishing therein as they should have done. *Strong v. Campbell*, 11 Barb. [N. Y.], 135. It must be added, however, that we do not undertake to pass upon the rules applicable to cases where the act or omission is wanton or malicious or where a duty of levying the tax becomes owing to some individual because such levy is directed by a court of competent jurisdiction in order to pay a judgment against a municipality. Cases of the former type are distinguished in *State v. Harris, supra*. Those of the latter type obviously differ from the case at bar.

There is another reason why the judgment of the district court should be affirmed. Even if the duty imposed

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on the defendants had been so far owing to the plaintiff that the defendants were personally liable for their error, the measure of damage would not be the amount of tax which should have been raised nor the difference between what was raised and what should have been, but only such actual damage as the plaintiff may have sustained. For instance, where the duty of levying a tax is enjoined by a court of competent jurisdiction in order to pay a judgment, the damages recoverable are the "expense and cost of the vain effort to have the judgment placed on the tax list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy; in short, any conceivable actual damage." *Dow v. Humbert*, 1 Otto [U. S.], 294. In the absence of proof of such actual damage, the liability is for nominal damages only. Mechem, Public Officers, section 785. In the case at bar no actual damage is shown. It does not appear that any expense has been incurred in attempting to procure the levy, and any property that escaped taxation by reason of the error is liable to levy as of the year in which levy should have been made under section 71, article 1, chapter 77, Compiled Statutes. Consequently there has been no impairment of the plaintiff's right to receive the money, and as far as the evidence discloses, the only damages recoverable in any event would be nominal. But it is well settled that a judgment will not be reversed merely to allow recovery of nominal damages, unless recovery of such damages will establish or preserve some right, or entitle the plaintiff to costs. *Heater v. Pearce*, 59 Neb., 583. In this case a recovery of nominal damages would accomplish nothing substantial, since the right of the district to the tax voted is sufficiently established by law and capable of vindication and preservation by mandamus to compel a subsequent levy. Nor, as the record stands before us, would such a recovery carry costs.

We recommend that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

AFFIRMED.

Darner v. Gatewood.

**J. H. DARNER V. A. T. GATEWOOD, RECEIVER OF THE MERCHANTS UNION INSURANCE COMPANY.**

FILED MARCH 5, 1902. No. 10,631.

Commissioner's opinion. Department No. 3.

**Receiver:** PLEADING AUTHORITY TO PROSECUTE SUIT. In an action by a receiver the plaintiff must plead and prove authority from the court appointing him to begin and prosecute the suit.

ERROR from the district court for Dawson county. Tried below before SULLIVAN, J. *Reversed.*

*E. A. Cook and G. W. Fox, for plaintiff in error.*

*Geo. C. Gillan and Warrington & Stewart, contra.*

AMES, C.

This cause was submitted without oral argument upon a brief by the plaintiff in error only. In his petition the defendant in error, plaintiff below, alleged that he had been appointed by the district court for Dawson county as receiver of the Merchants Union Insurance Company, a mutual insurance company organized under the laws of this state, and had been authorized by an order of the court in the action in which he was appointed to bring this suit. What the nature or purpose of the receivership action was he omitted to state. This suit was upon a premium note given by the plaintiff in error to the insurance company in consideration of a policy of insurance against fire upon certain of his property. The alleged authority to bring the action was denied by the answer, but not proved. We think this was fatal to the right of recovery. There is in the record an order made in the receivership suit reciting "that the assets and credits now in the hands of the receiver are insufficient to meet the debts and liabilities existing against said company" and ordering that the receiver "be empowered to levy an as-

assessment on the several stockholders of said company in accordance with the by-laws thereof, sufficient to realize a sufficient sum to meet said indebtedness, and to collect said assessment as provided by law and the orders of the court heretofore made in this matter." But there is nothing in the record showing what the previous orders of the court were, if any, or that there had been any judicial ascertainment of the value of the assets and credits of the company in the hands of the receiver, or that they had been converted into money and applied towards the payment of its debts; nor does there appear to have been any judicial ascertainment of the amount required from the stockholders for the satisfaction of the latter. The receiver appears to have substituted himself for the officers of the company, and to have made the assessment as though the institution had been a "going concern," but his action does not appear to have had the subsequent sanction or scrutiny of the court, and a judgment was prayed for and obtained upon that theory, for the full amount of the instrument sued upon, less payments previously made, that is, for \$399.63, although the amount of the existing unpaid assessment was only \$98.68. The judgment awarded execution for this amount immediately, with leave to apply for additional writs for the satisfaction of future assessments.

There is no allegation in the petition, nor is there any evidence as to what were the number and amount of the premium contracts in force, or as to what was or would have been a proportionate contribution from the defendant towards a fund requisite to liquidate the obligations of the company. The mere fact that the receiver had made an "assessment," a demand for certain sums is, of course, no evidence upon these subjects.

It is objected that the petition does not state facts sufficient to constitute a cause of action and that the judgment is unsupported by the evidence. We think that both assignments are well laid. *Booth v. Clark*, 17 How. [U. S.], at page 331; *Screven v. Clark*, 48 Ga., 41. It is



therefore recommended that the judgment of the district court be reversed and a new trial awarded.

DUFFIE and ALBERT, CC., concur.

REVERSED AND REMANDED.

**SARGENT RUSHTON ET AL., APPELLANTS, V. DIERKS LUMBER COMPANY ET AL., APPELLEES.**

FILED MARCH 5, 1902. No. 10,650.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: DEFICIENCY: CONSENT TO STAY: RELEASE OF SURETY.** An extension of the time of payment by agreement between the creditor and his debtor, based upon a consideration, will release the guarantor, unless he consents to such extension.
2. **Repeal of Statutes: DEFICIENCY JUDGMENTS: ACTIONS PENDING.** The repeal of sections 847 and 849 of the Code of Civil Procedure (chapter 95, Session Laws, 1897), permitting the recovery of deficiency judgments, did not affect actions then pending. *Hanscom v. Meyer*, 60 Neb., 68, 86 N. W. Rep., 381, followed.

APPEAL from the district court for Lancaster county. Tried below before HOLMES, J. *Reversed with directions.*

*Willard E. Stewart*, for appellants.

*Wilson & Brown*, contra.

DAY, C.

This suit was commenced in the district court for Lancaster county by Sargent Rushton and others against James C. Johnston, Morris W. Folsom and others to foreclose a mortgage upon certain real estate and to secure a judgment against the defendants, Johnston and Folsom, for any deficiency which might remain upon the debt after the sale of the mortgaged premises. On December 15, 1896, a decree of foreclosure was entered. An order of sale was caused to be issued by the plaintiffs on December 13, 1897, and on February 8, 1898, the premises were sold

pursuant to the decree and the proceeds thereof applied upon the mortgage debt. After applying the proceeds of the sale upon the debt there still remained due \$1,160 for which amount the plaintiffs moved for judgment against Johnston and Folsom. This motion for deficiency judgment was resisted by Johnston and Folsom upon separate grounds, which will be considered hereafter. The court denied the deficiency judgment against the defendants named, and the plaintiffs have appealed. The facts necessary to an understanding of the question presented by this appeal will sufficiently appear in the further discussion of the case.

On July 1, 1891, James C. Johnston and his wife, Mary M. Johnston, executed and delivered to Anna Miller a promissory note for the sum of \$2,000, secured by the mortgage foreclosed in this action. Subsequently, Anna Miller, who in the meantime had married Morris W. Folsom, sold and transferred the note and mortgage to the plaintiffs. At the time of this sale, and as an inducement thereto, the defendant, M. W. Folsom, entered into an agreement with the plaintiffs, which was indorsed upon the back of the note as follows: "I hereby waive notice of protest and guarantee any deficiency in the payment of the within note and coupons, in case of foreclosure. M. W. Folsom." On the same day the decree was entered, to wit, December 15, 1896, there was filed with the clerk of the district court in said case a stipulation between the plaintiffs and the defendants, James C. Johnston and Mary M. Johnston, which, omitting formal parts, was as follows:

"It is hereby proposed and agreed by and on behalf of the plaintiffs in the above entitled cause, that if order of sale is caused to be issued in above named cause within the period of one year from the 1st day of December, A. D. 1896, by and with the authority of said plaintiffs, then and in that event said plaintiffs will waive, cancel and satisfy, and discharge any and all deficiency judgment, or right thereto in above entitled cause, against

James C. Johnston, defendant herein. It is agreed upon the part of said James C. Johnston, that the plaintiffs have, and are hereby given, an option to cause said premises in plaintiffs' petition described, to be sold according to law and the decree of this court, at any time, conditioned upon the relinquishment of all claim against him for any deficiency which may arise on sale of said premises.

J. C. JOHNSTON.

"MARY M. JOHNSTON.

"WILLARD E. STEWART, *For Plaintiffs*.

"Dated this 14th day of December, 1896."

It is claimed by the appellants that the finding entered in the decree of foreclosure, to the effect that the amount of the decree is due from Johnston and Folsom, is conclusive as to Folsom's relations to this indebtedness and precludes him from now claiming any rights of a guarantor. In support of this contention we are cited to *Kloke v. Gardels*, 52 Neb., 117; *Devries v. Squire*, 55 Neb., 438, and *Potvin v. Meyers*, 27 Neb., 749. This case differs from the first two cases cited, in that in both of these cases the liability of the parties concerned was expressly put in issue by the pleadings and determined by the court. In this case the original petition in foreclosure disclosed Folsom's position as guarantor. It contains no allegation inconsistent with his present position. The finding of the court was simply that the amount of money was due from Johnston to Folsom, and did not undertake to deal with the relation in which Johnston and Folsom stood to each other; the amount so found due was declared to be a lien upon the mortgaged premises. This can not be held to be an adjudication that Johnston and Folsom are joint debtors, nor as any warrant for the plaintiff treating them as such in contravention of the express terms of Folsom's contract. This finding by an equity court as a basis of a sale of mortgaged premises is not by any means the equivalent of the merger of the whole claim in a joint judgment, such as took place in the case of *Potvin v. Meyers*, 27 Neb., 749.

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It will be noticed that the liability of Folsom was not that of an absolute guarantor of the payment of the note, his obligation was limited to such deficiency as might exist after the foreclosure and sale of the mortgaged premises. Under his guarantee the only way in which the amount of his liability could be determined was by a sale of the property. The right to sell the property and thus determine the amount of Folsom's liability accrued to the plaintiff twenty days after the decree was entered. This right, however, might be postponed for a period of nine months from the date of the decree upon the request of the mortgagor, but no longer. By this stipulation, however, the plaintiffs agreed that if he issued an order of sale within one year from December 1, 1896, that he would waive any deficiency. This stipulation between the plaintiff and Johnston and wife contains mutual agreements. It provided on plaintiffs' part that either a stay of one year from December 1st should be allowed or that all claims for a deficiency judgment against Johnston should be released. It stipulated on the part of Johnston and wife that their right to a nine months' stay should be waived; it was dated on the day prior to the entry of the decree. The mutual agreements thus entered into with a view to the taking of this decree constituted a valid consideration for each other, and were binding upon both plaintiffs and Johnston and wife. A delay of a year and more was had under them. It seems clear to us that this agreement materially altered the position of Folsom in relation to the contract, and cut off his opportunity to avail himself of the mortgaged property during the year stipulated for. Folsom's contract, of course, was entered into subject to the right of a nine months' stay on the part of Johnston and wife. This right of stay was, as above indicated, extended to one year from December 1, without his assent; his right to take up the decree seems not to have been impaired, but without his assent, his right to enforce it, if it had been so taken up, was postponed. In effect, the maturing of his liability was postponed for

three months, and his contract so far the well recognized rule of suretyship the time of performance without the co or guarantor would release him.

The defendant Johnston resisted the deficiency judgment against himself upon the act of 1897, repealing sections 84 Code of Civil Procedure, the plaintiffs' lien had been taken away. The trial court view. Since the ruling of the trial court passed upon precisely the same question the repeal of the sections above referred to deficiency was not taken away where the lien was taken away at the time of the repeal. *Thompson* 677, 82 N. W. Rep., 13; *Hanscom v. M* 86 N. W. Rep., 381.

In denying a judgment against Folsom the court was right, but it should have entered a judgment against Johnston. We therefore reverse the judgment of the lower court be reversed and a judgment for a deficiency be entered against James C. Johnston, for the amount prayed.

HASTINGS and KIRKPATRICK, CC., concur.

The judgment of the district court is reversed and directions to enter judgment against James C. Johnston, for the amount of deficiency judgment, and to deny the motion for deficiency judgment.

REVERSED WITH

JOSEPH STOREY V. WILLIAM KERR.

FILED MARCH 5, 1902. No. 10,710.

Commissioner's opinion. Department No. 2.

1. **Action Upon Lost Instrument: PLEADING MANNER OF LOSING.** In an action upon a lost instrument it is not necessary to allege the manner in which the instrument was lost.
2. **Pleading: WHEN DENIAL TREATED AS ADMISSION.** A denial of specified averments "as alleged in plaintiff's petition" will be treated as an admission thereof.
3. **Partial Payment: INDORSEMENT: PRESUMPTIONS.** Where partial payments are made upon a promissory note even after maturity it is a proper precaution for the party making such payments to see that they are indorsed upon the instrument. But there is no absolute legal requirement that payments be so indorsed, nor does a necessary legal presumption that such indorsements were made arise from the mere fact of payment.
4. **Trial: VERDICT AGAINST "THE DEFENDANT," WHEN MORE THAN ONE.** Only one of two defendants being served with process or having appeared, a verdict against "the defendant" is a verdict against the defendant in court.
5. **Trial: VERDICT: JUDGMENT AGAINST PARTY NOT IN COURT: COMPLAINT BY CODEFENDANT.** In such case, if the action admits of a several judgment, the defendant who was served with process and appeared and tried the case may not complain that judgment was entered irregularly against the other defendant as well.

ERROR from the district court for Adams county. Tried below before BEALL, J. *Affirmed.*

*Tibbets Bros. & Morey*, for plaintiff in error.

*John M. Ragan*, contra.

POUND, C.

The petition set up two promissory notes *in hæc verba*, and alleged that the originals had been lost after maturity but copies thereof preserved. The answer admitted that notes had been made, executed and delivered as described, denied that said notes had been "lost as alleged in plaintiff's petition," and set up payment by the principal maker,

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the other defendant being alleged to be surety only, and a release of the latter by extension of time without his knowledge or consent. These affirmative allegations were denied in a reply. We think this bare statement of the issues sufficient to dispose of the greater number of questions raised by the defendant, Joseph Storey, as plaintiff in error in this court. According to the plaintiff, copies of the notes had been prepared in anticipation of suit, and before it was brought the originals were lost or mislaid. After judgment had been obtained in the county court they were found, and the plaintiff, supposing they could be of no further use to any one, burned them. Subsequently the judgment was vacated and the cause in due course taken to the district court. Under this state of facts, it is contended that there can be no recovery because the plaintiff destroyed the notes deliberately and voluntarily. But it was not necessary for him to allege the manner in which the instruments were lost. 13 Ency. Pl. & Pr., 366. The allegation that they were lost tendered an issue of loss in such manner as not to deprive him of his right of action, and the answer denying that the notes were lost "as alleged in plaintiff's petition" is no denial of loss, but must be taken as admitting the allegation of the petition. *Phoenix Ins. Co. v. Meier*, 28 Neb., 124. We have not overlooked a further paragraph of the answer containing a general denial of each allegation of the petition not thereinbefore specifically admitted or denied. But that paragraph can not be applied to the allegations of loss of the notes which are expressly dealt with in another part of the pleading. So long as the answer admitted execution and delivery of the notes sued on and described in the petition and admitted loss of the originals, there was nothing to try further than the affirmative defenses of payment and release of the surety, and the circumstances of the loss were material only as they bore on such defenses and were facts to consider in determining whether these notes were paid or some others as claimed by plaintiff.

The defense chiefly urged was that A. G. Storey, the principal maker, had paid the greater portion in two several payments after maturity. His testimony was that he paid these sums and at the time directed that they be applied on the notes here in suit and requested that they be indorsed thereon. The plaintiff, on the other hand, testified that no such direction or request was made, but that the payments were upon other and different indebtedness. Counsel contend that the testimony of the plaintiff to this effect was improperly received. Their argument, to use their own words, is that "the unjustifiable destruction of these notes \* \* \* estops the defendant in error from introducing any secondary evidence to show but that the notes contained the indorsements contended for by plaintiff in error." But no one testifies, nor does it appear, that there ever were any such indorsements. The testimony of A. G. Storey is merely that he requested application and indorsement of the payments upon these notes. The plaintiff denies that such request was made. His testimony does not go to the contents or condition of any written instrument, but merely to what was said or was not said between him and one of the makers when the money was paid. No question under the best evidence rule was involved. In this connection we may notice also an instruction requested by defendant in which it was laid down as a matter of law that when payments are made upon a note they should be indorsed thereon. Indorsements of payments upon the instrument are receipts by the holder to the maker for the sums paid. *McDaniel v. Lapham*, 21 Vt., 222. In case of payment before maturity such indorsement is a necessary precaution to avoid liability to subsequent *bona fide* holders, and in all cases of partial payments it is better to take such receipts upon the back of the instrument. Hence the party making payment is entitled to demand it, and in many cases it is negligence for him to make payments and not so require. 2 Daniel, *Negotiable Instruments* [5th ed.], section 1228; *Kernohan v. Durham*,



48 Ohio St., 1. But there is no absolute requirement that payments be indorsed upon the instrument in order to operate as such. *Kasson v. Noltner*, 43 Wis., 646; *Palmer v. Blight*, 2 Wash. [C. C.], 96. And where, as here, the note is held at all times by the original payee, and the alleged payments are made after maturity, there is not the same necessity that the maker take such precaution. We do not think there is the absolute legal duty resting upon the holder, arising merely out of the payment of money on the notes after maturity, contended for by defendant, and hence we can not perceive that there is any necessary legal presumption from the mere fact of payment that corresponding indorsements will appear on the notes. No one in fact testifies that any were made. A. G. Storey says only that he requested indorsement, not that he saw to it that his request was carried out. Hence we think the instruction was properly refused. It told the jury, as we read it, that as a matter of law the mere fact of making payments on a note required them to be indorsed thereon. No legal presumption of execution of a written receipt of any kind arises merely from payment.

It has been indicated already that the only bearing of the circumstances of loss was upon the issue as to the indebtedness upon which the payments were made. An instruction requested told the jury that they might consider the destruction of the notes in passing upon this issue, and if this statement had stood alone might have been given with propriety, and doubtless would have been. But it was included in a long and complex request, which contains at least one unsound proposition, and the instruction as a whole was rightly refused. The other errors assigned as to instructions require but little notice. The defendant's fourth request, as to the necessity that loss or destruction of a note occur through accident, ignorance or mistake, was not pertinent to any issue raised by the pleadings. The matter set forth in the eighth request was given fully and clearly in the court's sixth instruction.

Two of the three objections made to the second instruction given at request of the plaintiff are untenable in view of the pleadings. The remaining objection, that it omits an important consideration bearing on the main issue, fails when this instruction is read in connection with the second paragraph of instruction six, which shows what is included in and would operate as payment as the term is used in the instructions. As to the objections to the form of the instruction, it merely states the legal effect of matters testified to by plaintiff, if the jury believe him. Its form is clearly conditional and hypothetical, and it assumes nothing. Finally, the fourth instruction given at plaintiff's request is objected to because in stating that the burden of proof as to payment is upon defendant and that if the direct testimony of plaintiff and A. G. Storey is in conflict and the jury find them of equal credibility and that the corroborating circumstances on each side are equal they should find for the plaintiff, it omits to refer to the destruction of the notes as a circumstance. But this instruction does not attempt to sum up the evidence or rehearse the circumstances pertinent to the issue. It tells the jury that they are sole judges of the credibility of the witnesses and only points out their duty in case of equally balanced evidence, equally creditable and equally corroborated by circumstances. The instruction is so clearly conditioned on the jury's finding the circumstances equally balanced that no misunderstanding could have ensued.

We have examined in detail the several alleged errors in the introduction of evidence. These all relate to matters testified to by plaintiff in rebuttal. No questions of law of other than the most elementary character are involved, and, after reading the whole testimony, we think the portions complained of were material and admissible to meet and explain the testimony of A. G. Storey. In order to show upon what claims the moneys paid by the latter were applied and credited and the circumstances which led to payment of one claim rather than another,

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it was necessary to go into the business transactions of the parties rather fully. We do not think this testimony was introduced either as impeaching A. G. Storey or on the theory that he was a party. It simply met and rebutted what the latter had asserted with reference to the principal issue on trial.

Several errors are assigned upon the form of the verdict and the judgment rendered thereon. The plaintiff sued A. G. Storey and Joseph Storey, but only the latter was served with process or made any appearance. The jury rendered a verdict against "the defendant," which is assailed as uncertain and ambiguous. We see no force in the objection. "Defendant" obviously means the defendant in court. There was no other defendant against whom a verdict could be rendered. Notwithstanding only one of the defendants was in court, a judgment was rendered against both, and this is assigned as error by the defendant who appeared and tried the case and against whom the verdict was found. But however irregular and erroneous as to the other defendant, we fail to see how this prejudiced the plaintiff in error. This action admitted of a several judgment, and is entirely within the rule announced in *Bates-Smith Investment Company v. Scott*, 56 Neb., 475. Counsel say that the judgment does not conform to the verdict and is therefore erroneous under the decision in *Morsch v. Besack*, 52 Neb., 502. But in that case the failure to conform to the verdict prejudiced the party complaining. Here it does not so operate.

We recommend that the judgment be affirmed.

OLDHAM and SEDGWICK, CC., concur.

**AFFIRMED.**

CORA E. DRURY, APPELLEE, V. ARTEMUS ROBERTS ET AL.,  
APPELLANTS, IMPEADED WITH LOUISA M. PILLSBURY  
ET AL., APPELLEES.

FILED MARCH 5, 1902. No. 10,862.

Commissioner's opinion. Department No. 1.

**Mortgage Foreclosure:** PLEADING "PROCEEDINGS AT LAW" AND PROOF. In a suit to foreclose a real estate mortgage, the petition must allege whether any proceedings at law have been had for the recovery of the debt or any part thereof, and when the answer is a general denial, there can be no recovery in the absence of proof sustaining such allegation of the petition. *Jones v. Burtis*, 57 Neb., 604, followed.

APPEAL from the district court for Lancaster county.  
Tried below before CORNISH, J. *Reversed.*

*Samuel J. Tuttle*, for appellants.

*George A. Adams* and *E. F. Pettis*, contra.

DAY, C.

Cora E. Drury brought this suit in the district court for Lancaster county against Artemus Roberts and Mary B. Roberts and others to foreclose a mortgage upon 100 acres of land described as the north 100 rods of the north-west quarter of section 33, township 10 north, of range 7 east of the 6th P. M. in Lancaster county. This mortgage was executed by Artemus Roberts and his wife, Mary B. Roberts, to secure the payment of a note for \$3,500, the grantee therein being the Lincoln Savings Bank & Safe Deposit Company. Soon after the execution of the mortgage it was for a valuable consideration sold and assigned to the plaintiff. Jennie E. Frankish, one of the appellees herein, was made a party defendant and by leave of court filed an answer and cross-petition alleging that she was the owner and holder of a mortgage which was a lien upon a distinct parcel of the premises covered by the plaintiff's mortgage. As there had been no default

in this mortgage, appellee, Frankish, did not pray for a foreclosure but asked merely for a determination of priorities of liens. The appellants, Roberts, denied generally the allegations of the petition and set up a claim of homestead in the lands covered by the mortgage, especially claiming that a strip of uniform width from the south side of said lands containing twenty acres, and including the family home, be declared to be the homestead, and that the residue of the tract be first sold for the satisfaction of any amounts which might be found due. As to the cross-petition of the defendant, Frankish, appellants, Roberts, also filed a general denial, admitting, however, that she was the holder of the note and mortgage described in her cross-petition. The trial resulted in a decree in favor of the plaintiff and also in favor of the defendant, Frankish, on her cross-petition. The premises were ordered to be sold in parcels to satisfy the decree. From this judgment the defendants, Artemus and Mary B. Roberts, have appealed.

One of the grounds upon which a reversal of the decree is claimed is that there was no proof offered to sustain the allegations in the petition and cross-petition that no proceedings had been had at law for the recovery of the debt secured by the mortgage or any part thereof. The record shows that no proof in support of this averment was made. That such an allegation should be made in a petition to foreclose a real estate mortgage is a statutory requirement, into the wisdom of which it is not the province of the court to inquire. It being a necessary allegation in a petition of foreclosure, when denied by general or special denial must be sustained by proof. Section 850 of the Code of Civil Procedure relates to this matter and is as follows: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid."

In *Jones v. Burtis*, 57 Neb., 604, it is said: "In a suit to foreclose a real estate mortgage the petition must allege whether any proceedings at law have been had for the recovery of the debt, or any part thereof; and where the answer is a general denial there can be no recovery, in the absence of proof sustaining such allegation of the petition." In later cases the same doctrine was approved: *Kirby v. Shrader*, 58 Neb., 316; *Miller v. Nicodemus*, 58 Neb., 352. Upon the authority of the foregoing cases it is clear that the case must be reversed.

Appellants also complain of the order in which the several parcels of land covered by the plaintiff's mortgage should be sold to satisfy it, and we are asked to give some direction for the guidance of the trial court with reference to the order of sale and the distribution of the proceeds. An examination of the record, however, shows that while certain conveyances are alleged to have been made by the grantors of plaintiff's mortgage, to certain parcels of the tract covered by it, and while Jennie E. Frankish admits them, they are denied by the other answering defendants, and no proof of such alienation is found in the record. In the absence of proof of the order and terms of alienation it is impossible to pass intelligently upon the question suggested. The conditions of the deed, by which the grantors in the Frankish mortgage acquired title, is an important factor in determining whether the tract covered by the Frankish mortgage should be sold and the proceeds applied in discharge of plaintiff's mortgage before the sale of the homestead tract. As the deeds are not in the record we do not pass upon the question.

We therefore recommend that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

FRANK SCHAFF V. DAVID W. HAMILTON.

FILED MARCH 5, 1902. No. 11,040.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: CONFLICTING EVIDENCE.** Where the evidence is conflicting, but there is sufficient evidence to support the verdict, it will not be disturbed.
2. **Appeal and Error: SUFFICIENCY OF INSTRUCTIONS.** Instructions examined, and *held* to fully and fairly submit to the jury the plaintiff's and defendant's theory of the case.

APPEAL from the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

*A. J. Evans and Matt Miller, for plaintiff in error.*

*A. M. Walling and Geo. P. Sheesley, contra.*

DAY, C.

David W. Hamilton brought this action in the district court for Butler county against Frank Schaff to recover damages for a breach of contract in the sale of 2,000 head of sheep. The plaintiff's case, as made by his pleading and the testimony in his behalf, shows that on November 16, 1897, the plaintiff sold to the defendant 2,000 head of sheep at the agreed price of \$3.60 each, to be delivered to the defendant at the plaintiff's farm in Butler county, in lots as follows: Two car loads on November 17, 1897, and the remainder of said sheep on November 24, 1897, and that defendant was to pay the purchase price thereof on or about November 25, 1897. That pursuant to this agreement the plaintiff on November 17, 1897, delivered to the defendant and the defendant accepted and received on said day two car loads of said sheep, being in number 542; that after the defendant had accepted and received said two car loads of sheep and driven them to the station at Millerton for the purpose of shipment to market, he abandoned said two car loads of sheep and refused to carry out and complete the contract and refused to pay

for said two car loads or the remainder of said sheep or any part thereof, and notified the plaintiff that he repudiated the entire transaction and would have nothing further to do with any of said sheep; that in order to save further and unnecessary damage by reason of the abandonment of said sheep by the defendant, the plaintiff took charge of them on November 18, 1897, and shipped said two car loads of sheep to market and made sale of them at the best and highest price they would bring and received therefor \$1,574.87; that the remainder of said sheep, being in number 1,548, were of the market value of \$3.10 per head; that by reason of the violation of the contract the plaintiff has suffered damages in the sum of \$1,031.87. The defendant's theory, as indicated by his answer and the evidence in his behalf, was that he agreed to purchase two car loads of the sheep to be delivered at the stock yards at Millerton, provided that they would weigh on an average of eighty-five pounds each; that when they were weighed they did not average to exceed seventy-five pounds each, and defendant then and there refused to accept or receive them. The plaintiff denied by reply all of the allegations of defendant's answer. The trial resulted in a verdict for the plaintiff for \$640.87, upon which judgment was rendered, to review which the defendant brings error to this court.

The principal error upon which the defendant relies for a reversal of the case, relates to the instructions of the court, particularly to instruction No. 11, which is as follows:

"If you find for the plaintiff the measure of his damages is the difference between the price the defendant agreed to pay him for the sheep, and the actual market value of the sheep, at the time and place they were to be delivered; and if you find that the plaintiff, in good faith, shipped the two car loads of sheep, which had been taken to the station at Millerton, to market, and sold them for as high a price as he could reasonably obtain therefor, then you should consider the net amount which he received



for the two car loads of sheep, after allowing for the reasonable and necessary expenses of their shipment and sale, to be their actual value at the time they were to be delivered; and if you find, from the whole evidence in the case, that the actual market value of the 2,000 sheep, at the time and place they were to be delivered, was less than the contract price agreed upon between the parties, then the difference would be the plaintiff's damages in this case. On this amount you should allow interest from the 24th day of November, 1897, to the 14th day of November, 1898, at seven per cent. per annum."

The defendant's contention is that by the foregoing instruction the jury is directed that if the plaintiff is entitled to recover at all he is entitled to recover damages for the sale of 2,000 head of sheep, thus depriving the jury of the right to determine whether the defendant had purchased 2,000 head of sheep or only two car loads. The evidence was undisputed that the sheep taken to the station did not weigh on the average eighty-five pounds each, and hence, according to the defendant's theory, if the jury believed his statement as to what the contract was, there was no basis for a judgment against him. The difficulty in applying the defendant's present theory of the case is that it has no support in the pleadings or the evidence. Defendant swears positively that he agreed to purchase the two car loads of sheep delivered at the station at Millerton on the express condition that they would weigh on an average of eighty-five pounds each. The plaintiff is equally positive that he sold 2,000 sheep to be delivered on his farm at \$3.60 per head. The evidence, as before stated, is undisputed that the sheep did not weigh on the average of eighty-five pounds each. Under the pleadings and the evidence the court and jury could only accept the plaintiff's theory as an entirety or the defendant's theory as an entirety; there was no middle ground. By appropriate instruction the court submitted the defendant's theory to the jury by instruction No. 10, as follows:

"But if, on the other hand, you find from the evidence, that the contract made between the parties on the 16th day of November, 1897, was that the plaintiff and defendant should take two car loads of the plaintiff's sheep to the railroad station at Millerton on the following day, and should there weigh the same, and if the said sheep weighed on an average of eighty-five pounds or more each, then the defendant should receive the same and pay the plaintiff therefor the sum of \$3.60 per head, and that, in pursuance of such agreement, the plaintiff and defendant did take two car loads of said sheep, on the 17th day of November, 1897, to the said railroad station, and did weigh the same, and the same weighed less than eighty-five pounds each on the average, and weighed about seventy-five pounds each on the average, and that thereupon and for that reason the defendant refused to take the sheep, and did not accept the same under said contract, then you should find for the defendant."

We have carefully examined the instructions of the court and in our opinion they fully and fairly submit all of the issues tendered by the pleadings and the evidence. As before stated, there was a direct conflict in the evidence as to what the contract was, and in such case the finding of the jury is conclusive upon this court where there is sufficient evidence to support the verdict. *Peaks v. Lord*, 42 Neb., 15; *Barr v. Omaha*, 42 Neb., 341; *Lee v. Brugmann*, 37 Neb., 232; *Hodgman v. Thomas*, 37 Neb., 568; *Prewitt v. York County*, 43 Neb., 267.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CO., concur.

AFFIRMED.

SEDGWICK, J., not sitting.

Jones v. Miller.

JOHN C. JONES, APPELLEE, v. CHRISTIAN M. MILLER ET AL,  
APPELLEES, AND JOHN J. MILLER, APPELLANT.

FILED MARCH 5, 1902. No. 11,094.

Commissioner's opinion. Department No. 3.

**Appeal and Error:** ORDER APPEALED FROM NOT IN TRANSCRIPT. Where,  
on appeal, the order or judgment complained of is not included in  
the transcript, the appeal will be dismissed.

APPEAL from the district court for Gage county. Tried  
below before LETTON, J. *Appeal dismissed.*

*Samuel Rinaker and R. S. Bibb, for appellant.*

*Hugh J. Dobbs, contra.*

ALBERT, C.

This is an appeal from an order confirming a sale of real estate, in satisfaction of a decree of foreclosure. The entire argument of appellant is directed against an order confirming a sale of such real estate by a special master. The chief complaint of appellant is that such sale was made by a special master whose appointment was void. But the record before us contains no order confirming a sale made by a special master. It does contain an order confirming a sale made by the sheriff, but no complaint is made of such order; on the contrary, it appears to have been made by the very officer appellant insists should have made it. The record does not purport to be complete, but, as the parties to it appear to be satisfied with it, we must take it as we find it. The order complained of, so far as appears from the record, does not exist.

The appeal should be dismissed, and we so recommend.

AMES and DUFFIE, CC., concur.

APPEAL DISMISSED.

Opinion on rehearing follows.

JOHN C. JONES, APPELLEE, v. CHRISTIAN M. MILLER ET AL.,  
APPELLEES, AND JOHN J. MILLER, APPELLANT.

FILED NOVEMBER 6, 1902. No. 11,094.

Commissioner's opinion. Department No. 2.

1. Courts, District: ENFORCING DECREE AFTER TERM AT WHICH RENDERED. The district court has power to make any orders necessary to enforce its decrees, even after the adjournment of the term at which they are rendered.
2. Courts, District: ORDERS ENFORCING DECREE AFTER TERM: PRESUMPTIONS. The presumption is that such orders are regular and made upon proper notice. One who objects to them, for want of notice, where the record does not show such fact affirmatively, must sustain his objection by some proof in order to overcome such presumption.
3. Mortgage Foreclosure: IRREGULARITIES: NO INJURY CLAIMED. A sale of real estate upon a decree of foreclosure should not be set aside for mere irregularities, where no claim is made that the complaining party has been injured thereby.

REHEARING of case reported *ante*, page 581.

APPEAL from the district court for Gage county. Tried below before LETTON, J. *Judgment below affirmed.*

*Samuel Rinaker and R. S. Bibb, for appellant.*

*Hugh J. Dobbs, contra.*

BARNES, C.

This is an appeal from the order of the district court for Gage county confirming a sale of real estate under a decree of foreclosure. The case was originally heard before department No. 3 of the commission, and an opinion written dismissing the appeal, which was approved by the court, and will be found reported *ante*, page 581, and in 89 N. W. Rep., 598. A rehearing has been allowed, and the case is now before us the second time for our consideration and decision upon the merits.

1. Appellant's first and principal contention is that the

special master commissioner, who made the sale, had no authority to act in the matter, because the decree, as it was first entered, provided, after the usual judgment of foreclosure, that the same should be enforced, in case the amount found due was not paid, by the sheriff of said county; and that the special master commissioner who made the sale was appointed by the court, and the decree thus changed and altered without notice to the appellant. In support of this contention we are cited to *Anderson v. McCloud-Love Live Stock Commission Co.*, 58 Neb., 670, 79 N. W. Rep., 613. In that case it was held that "a decree of foreclosure, after the final adjournment of the term at which it was rendered, can not be changed in any essential particular without due notice to the parties interested and an opportunity to be heard." It was further held that "after the adjournment of the term the court retains jurisdiction for the purpose of enforcing the decree, but not for the purpose of destroying it." An examination of that case discloses that the decree was changed and altered in its essential particulars in this that a portion of the property described therein was released from its operation, and a different order made as to which tract of land described therein should be sold first. This certainly was an essential change in the decree itself. There can be no doubt, however, that the court may make all necessary and proper orders to enforce its decrees, even after the term at which they have been rendered. It appears from the record in this case that two ineffectual attempts had been made by the sheriff of Gage county to enforce this decree. In each case the appraisement had been set aside on the application of the appellant. Thereupon the following proceedings were had: "Now on this 19th day of April, 1899, this cause coming on to be heard, S. D. Killen is hereby appointed special master commissioner to make the sale of the mortgaged premises herein, according to law, and report his proceedings to this court."

It can scarcely be contended that the court had no

power to make such order; but the principal contention is that the order was made without notice. This fact does not appear in the record, and there was no evidence in support of this contention ever offered by the appellant. The presumption is that a court of record and of general jurisdiction acts only upon proper notice, and in a regular and proper manner. Where it is alleged that proceedings of such court have been had without notice, and the record does not show affirmatively whether notice was given or not, that presumption is sufficient to overcome the objection, unless some evidence is offered in support of it. The appointment of a special master commissioner to enforce the decree, after the sheriff had made two abortive attempts to do so, was clearly within the power of the court under section 852 of the Code. *American Investment Co. v. Nye*, 40 Neb., 720; *State v. Holliday*, 35 Neb., 327. See also second paragraph of syllabus in *Anderson v. McCloud-Love Live Stock Commission Co.*, 58 Neb., 670. In any event it is not claimed by the appellant that the appointment of the special master commissioner resulted in any prejudice to his rights whatever.

We therefore hold that, as the record stands, the action of the court in appointing a special master commissioner to make the sale of the premises in controversy was correct.

2. It is next contended that the order of sale upon which the property was sold is not sufficient, (a) because it was directed to the special master commissioner of the county, and not to S. D. Killen, special master commissioner; (b) because the order of sale is insufficient, contains no recitals from the decree, and has no copy of the decree attached thereto. These objections are entirely technical and without any merit whatever. An examination of the proceedings under the order of sale, and of the decree, shows that the sale was conducted strictly in accordance with its terms. This being true the fact, if such fact existed, that the order of sale did not have a copy of the decree attached to it resulted in no prejudice

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to the appellant. In fact an order of sale is not necessary, and the sale made upon, and in accordance with, the terms of the decree itself, is sufficient without any order whatsoever. *Rector v. Rotten*, 3 Neb., 171; *Fried v. Stone*, 14 Neb., 402; *Bristol Savings Bank v. Field*, 57 Neb., 670; *Jarrett v. Hoover*, 54 Neb., 65. A sale of real estate upon a decree of foreclosure should not be set aside for mere irregularities or errors which do not prejudice the rights of the complaining parties. *Miller v. Lanham*, 35 Neb., 886. There is no contention here that any of the substantial rights of the appellant have been jeopardized, or that he has been injured in the slightest degree by the proceedings herein complained of.

For the foregoing reasons we recommend that the decree appealed from be affirmed.

OLDHAM and POUND, CC., concur.

The judgment heretofore entered in this case dismissing the appeal is hereby denied and held for naught, and the decree confirming the sale of real estate in this case is affirmed.

JUDGMENT BELOW AFFIRMED.

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JAMES G. STEUVE V. REPUBLICAN VALLEY RAILROAD COMPANY.

FILED MARCH 5, 1902. No. 11,149.

Commissioner's opinion. Department No. 3.

**Eminent Domain: DAMAGES: OCCUPATION: LIMITATION OF ACTIONS: EASEMENT.** In 1887 a railroad company instituted proceedings to condemn two lots for railroad purposes. The appraisers appointed by the county judge found the value of the lots to be \$2,700 and assessed the damage of the owner at that sum. The company paid the money into court, but took an appeal to the district court, where, before the trial, it offered to allow judgment to be taken for \$1,266, which the owner refused to accept. On the trial the owner was awarded \$1,250, and judgment for the costs accruing after the offer was assessed against him. Thereafter, at the request

of the railroad company, the owner conveyed the lots by warranty deed to G. W. Holdrege, trustee, the deed reciting that it was made to satisfy condemnation proceedings in the district court. The deed bears date of December 16, 1887. The lots remained vacant and unoccupied until May, 1899, when the former owner erected a building on the lots for use as a real estate office, and thereupon the railroad company enclosed the lots with a high fence, first moving thereon a building in which it kept lamps and oil, and which certain of its employees occupied. The gate in the fence was kept locked and the former owner denied access to the building erected by him and he brought an action to restrain the company from interfering with his possession and use of the lots, claiming that the company had acquired only an easement in the lots and that he was entitled to the possession and use of the same in any manner that was not inconsistent with the easement of the company. *Held*, That his deed gave the company a fee-simple title to the lots, and that it was entitled to the exclusive possession thereof the same as any other owner of a fee title. The plaintiff also claimed that by its failure to occupy or use the lots for more than ten years the defendant had abandoned all right or title thereto. *Held*, That, conceding that the plaintiff's deed should be construed to convey only an easement in the lots, still, as the easement was conveyed by deed, it could only be extinguished by adverse possession for the same length of time that is required to extinguish the title of the owner of the fee.

ERROR from the district court for Furnas county. Tried below before NORRIS, J. *Affirmed*.

*McCreary & Button*, for plaintiff in error.

*J. W. Deweese and Frank E. Bishop*, contra.

DUFFIE, C.

This is an action in equity brought by the plaintiff to enjoin the defendant from interfering with his possession and use of lots 11 and 12 in block 27 in the village of Oxford, Nebraska. It appears from the plaintiff's petition and from the record before us that the plaintiff was the owner of these lots prior to June 14, 1887. On that date the defendant, the Republican Valley Railroad Company, instituted proceedings to condemn said lots for railroad purposes. A jury of freeholders was duly appointed by the county judge, who viewed the lots, assessed



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their value at \$2,700, and awarded the plaintiff damages in that sum. From this award the defendant appealed to the district court, where, upon a trial of the case, the plaintiff was awarded \$1,250, as damages for the appropriation of his property.

It appears that prior to the trial of the cause the railroad company made an offer in writing to allow judgment to be taken against it for the sum of \$1,266.46, and the judgment entry recites the following: "And it appearing that the appellant in this action obtained a more favorable amount than was given by the freeholders appointed by the county judge; and it further appearing that on the 5th day of December, 1887, the defendant in the action served upon the plaintiff an offer in writing to allow judgment to be taken against it for the sum of \$1,266.46, and that the plaintiff refused to accept the same; and it further appearing that on the 5th day of December, 1887, the defendant served upon the plaintiff a notice in writing that on the 13th day of December, 1887, it would in this court offer to confess judgment for the sum of \$1,266.46, and it further appearing that on the 18th day of December, 1887, the said plaintiff, being present in said court, refused to accept such confession of judgment, it is therefore considered and ordered that the plaintiff pay the costs in this action from and since the 5th day of December, 1887."

On the 16th of December the plaintiff and his wife executed a warranty deed for said lots to G. W. Holdrege, trustee; the deed reciting that it is made to satisfy condemnation proceedings in the district court of this state.

In his petition the plaintiff alleges that this deed was made at the request of the railroad company, and by it accepted in satisfaction of the judgment of condemnation aforesaid and without any other consideration. He further states that the railroad company has never utilized the lots for the purpose for which they were condemned, but that they remained vacant and unused by any one until May 6, 1899, when plaintiff, being desirous of using

the lots, but in such a manner as not to interfere with the use of the same by the defendant for railroad purposes, erected thereon a small temporary office building which was not in any manner connected with the soil, and which was to be used by the plaintiff as a real estate office; that immediately thereafter the company, to harass and annoy the plaintiff, moved onto the lots an oil or lamp house, formerly used on the defendant's original right of way, and subsequently, and in defiance of plaintiff's right to use the property, the defendant erected around the lots a strong fence so that it is useless to plaintiff in his occupation thereof. Plaintiff further alleges that the railroad company does not occupy any portion of the lots with any business connected with the operation of its road, but that certain of its employees occupy the lamp house placed upon the lots, and these are changed from time to time and their names are to him unknown. That the gate in the fence is kept locked and the plaintiff is denied access to his building. It further appears from the petition that these lots were entirely separate and in no manner connected with the property which has been used by the company for railroad purposes, and he alleges that because of the non-use of the property since its condemnation, and because the company at the time of his taking possession were not using it for any purpose, he is entitled to use and occupy the property. A demurrer to this petition was sustained by the district court, and the plaintiff refusing to amend, a decree was entered dismissing his bill, and from this decree he has appealed to this court.

At the time of filing this petition it appears to have been the theory of the plaintiff that the railroad company had acquired a mere easement in the property, and that he was entitled to such use and occupation of the lots as was not inconsistent and which would not interfere with their use by the defendant under its easement. Upon the oral argument, and in a supplemental brief since filed, he takes the position that the railroad company has

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abandoned the lots, and that they revert to him as the owner of the fee. We will not stop to discuss the question whether G. W. Holdrege, trustee, the grantee of the deed made by the plaintiff and wife, is a necessary party to this proceeding, but will dispose of it upon the theory advanced by the plaintiff that the railroad company is the real beneficial owner of whatever interest was conveyed by the plaintiff's deed to Holdrege, trustee. In the first place it might be observed that it clearly appears from the plaintiff's petition that the lots were not taken by the railroad company for right of way purposes; they are situated some distance from the right of way, and were not needed for use in the operation of trains. To what use the railroad intended to appropriate them does not appear, but there are many uses for which a railroad company has to acquire property independent of the mere operations of its trains. That the company may purchase and hold real estate necessary for its use can not be disputed. That it may take the fee title, as well as an easement, no one will question. That it took fee in this case can not be doubted. The deed recites that it is given in satisfaction of condemnation proceedings. There was nothing to satisfy in those proceedings except the judgment for costs against the plaintiff. When the appraiser fixed the value of the plaintiff's lots at \$2,700, the railroad company paid that amount to the county judge. When judgment for \$1,250 was entered against the railroad company on the trial of the appeal, the money was already in court to be paid over to the plaintiff. There was nothing further for the railroad company to do. If it desires only an easement in these lots, no deed was necessary. The amount of costs assessed against the plaintiff on the trial of the appeal does not appear; but that the railroad company satisfied its judgment for costs in consideration of this deed is apparent from the deed itself, it being made to satisfy condemnation proceedings which were already satisfied so far as the company was concerned when the deed was made, the only part remaining

unsatisfied being the payment of costs assessed against the plaintiff. But further than this we do not know of any principle of law which will allow the plaintiff in the face of this deed to say that it did not pass the fee of these lots. No claim is made that it was procured by fraud, no action of the court is invoked to reform it or set it aside, no claim is made that it does not express the true intent and meaning of the parties. In this condition of affairs every principle of law requires us to give it that effect which its wording demands. Plaintiff refers us to section 53, chapter 73, of the Compiled Statutes, as follows: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

We know of no rule of law which will allow us to construe a warranty deed in the usual form plainly conveying the fee-simple title into an instrument giving to the grantee a mere easement in the premises, and the intent of the parties, so far as we can gather it from the deed and from the circumstances under which it was made, was to convey the fee-simple title to these lots in consideration of the satisfaction of the judgment for costs entered against the plaintiff in condemnation proceedings. But admitting that the deed was intended to convey, and did only convey, to the grantee an easement in the lots, can the claim of the plaintiff now made that the railroad company has abandoned this easement be sustained? It is insisted that non-user of an easement for the length of time required to establish title to real estate by adverse possession constitutes abandonment, and that thereafter the owner of the fee may re-enter and hold his land. Whatever may be the rule in relation to the abandonment of an easement acquired otherwise than by deed, the authorities all agree that non-user of an ease-

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ment acquired by deed for any length of time is not an abandonment. The right of an easement created by deed can only be extinguished by adverse possession for the same length of time that is required to extinguish the title of the owner of the fee. Washburn, in his work on Easements and Servitudes, fourth edition, page 717, in discussing this question says: "In the first place, if the easement has been acquired by deed, no length of time of mere non-user will operate to impair or defeat the right. Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time long enough to create a prescriptive right, will destroy the right granted."

We can see no merits in any of the claims made by the plaintiff. He has received pay for his lots. He has conveyed away the title. The fact that the conveyance was made to a railroad company or a trustee for the use of that company gives him no greater right to reclaim this property than if he had sold to some individual. On the case made by the plaintiff's petition the court was clearly right in sustaining the demurrer upon the ground that the petition did not state a cause of action, and we recommend that the judgment dismissing the plaintiff's petition be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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HUGH H. BAXTER, APPELLEE, V. JOHN SCHMITZ ET AL.,  
APPELLANTS.

FILED MARCH 5, 1902. No. 11,169.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: APPEAL: PREJUDICE.

APPEAL from the district court for Custer county.  
Tried below before SULLIVAN, J. *Affirmed.*

*J. R. Dean, for appellants.*

*Alpha Morgan, contra.*

DUFFIE, C.

This is an appeal from an order confirming a sale made under a decree of foreclosure. We find no irregularity in the proceedings which did or could in any manner prejudice the appellant, and therefore recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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CHARLES T. JENKINS V. ARTHUR MYATT ET AL.

FILED MARCH 5, 1902. No. 11,183.

Commissioner's opinion. Department No. 1.

**Appeal and Error: JURISDICTION: ASSIGNMENTS NOT IN MOTION FOR NEW TRIAL.** An error not going to the jurisdiction of the trial court, and not called to its attention in any way, by motion for new trial or otherwise, will not be regarded in this court.

**ERROR** from the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

*Charles T. Jenkins, for plaintiff in error.*

*Geo. P. Sheesley and W. W. Stowell, contra.*

HASTINGS, C.

Only one point is raised by the brief of plaintiff in error in this case, viz.: That the answer of defendant, Wyatt, only asks that the cause be dismissed and for costs, and so will not support a judgment in defendant's favor for the value of the property replevied. An examination of the motion for a new trial and the petition in error fails to show any allegation of error in this respect, or that the alleged defect was called to the atten-

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tion of the trial court in any way. While the verdict is alleged to be contrary to law, no such complaint is made as to the judgment. One error assigned is that the answer admits the return of the property, but this is not the case. It only alleges the institution of an action to get it. Whether or not the statute providing for relief of a defendant in a replevin suit should be held to warrant affirmative relief, even when none is prayed for, is not necessary to be decided in this case.

It is recommended that the judgment of the district court be affirmed.

DAY, C., concurs. KIRKPATRICK, C., not sitting.

**AFFIRMED.**

SEDGWICK, J., not sitting.

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**P. B. BRAYTON V. MARY J. OAKS ET AL**

FILED MARCH 5, 1902. No. 11,186.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: DEFICIENCY: EFFECT OF REPEAL OF STATUTE.** The repeal of section 847, and a portion of 848, and of 849 of the Code of Civil Procedure, commonly known as the deficiency judgment law, in no manner affected the rights or remedies existing in an action, which had been commenced or which were incident to a cause of action which had accrued and was existing at the time of the taking effect of such repeal.
2. **Mortgage Foreclosure: JUDGMENT AT LAW AFTER DECREE AND REPEAL OF STATUTE.** An action at law can not be maintained, to recover a judgment for any portion of the mortgage debt after a decree of foreclosure where the action to foreclose the mortgage had been commenced, or the cause of action therefor had accrued and was existing, at the time of the repeal of the law commonly known as the deficiency judgment law, without an order of the court authorizing the prosecution thereof.

ERROR from the district court for Fillmore county.  
Tried below before HASTINGS, J. *Affirmed.*

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*F. B. Donisthorpe*, for plaintiff in error.*Chas. H. and Frank W. Sloan*, contra.

The deficiency judgment act of 1897, prohibiting the rendition of deficiency judgments, both in foreclosure proceedings, and in independent legal action thereafter, was enacted to do away with the deficiency judgments in foreclosure proceedings, and after foreclosure proceedings had been terminated, and by so doing not deprive the mortgagee of a full and adequate remedy both at law and equity, nor in anywise impair the obligation of any contract: *Cooley*, Constitutional Limitations [4th ed.], 331; *Branson v. Kinzie*, 1 How. [U. S.], 311; *Barnitz v. Beverly*, 163 U. S., at page 123; *Green v. Biddle*, 8 Wheat. [U. S.], at page 75; *Tennessee v. Sneed*, 96 U. S., 69; *Newark Savings Institution v. Forman*, 33 N. J. Eq., 436; *Berthold v. Fox*, 13 Minn., 462; *Conkey v. Hart*, 14 N. Y., 22; *Van Rensselaer v. Snyder*, 13 N. Y., 299; *Van Rensselaer v. Hays*, 19 N. Y., 68; *McMillan v. Sprague*, 4 How. [Miss.], 647; *Story v. Furman*, 25 N. Y., at page 223; *Ex parte North-East S. W. & Ala. R. Co.*, 37 Ala., 679; *Gut v. State*, 9 Wall. [U. S.], 35; *Butler v. Palmer*, 1 Hill [N. Y.], 324; *Jacquin v. Commonwealth*, 9 Cush. [Mass.], at page 282; *Lennon v. Mayor*, 55 N. Y., 361; *Stocking v. Hunt*, 3 Denio [N. Y.], 274; *Marion v. State*, 20 Neb., 233.

BARNES, C.

On the 28th day of May, 1889, Mary J. Oaks and Henry Oaks executed and delivered to the plaintiff in error herein a note or coupon bond for the sum of \$600 and secured the payment of the same by a mortgage on certain lots in the city of Geneva, Fillmore county, Nebraska. Shortly after the defendant, Walter S. Huston, purchased the premises described in the mortgage, and by the terms of the deed of conveyance, which he received from Mary J. Oaks and Henry Oaks, he assumed and agreed to pay the mortgage debt. Default was made in the pay-



ment of the note at the time it became due, in May, 1894, and on the 2d day of September, 1897, an action was commenced in the district court for Fillmore county against Mary J. Oaks, Henry Oaks, and Walter S. Huston, among others, to foreclose the mortgage. A decree of foreclosure was had, the property described in the mortgage was sold, and the proceeds brought into court and applied upon the amount found due by the decree of foreclosure. After the foreclosure proceedings were ended the plaintiff filed his petition, in this action at law, in the district court for Fillmore county, against the defendants herein, without having obtained authority from the court to institute such suit, and in his said petition set forth the facts of the execution and delivery of the note and mortgage; the assumption of the mortgage debt by the defendant, Huston; that suit had been commenced to foreclose the mortgage, and a decree of foreclosure in such proceedings had been duly entered; that the premises described in the mortgage had been sold and the proceeds applied to the payment of the decree; the termination of the proceedings; the fact that there still remained due on the note or coupon bond, the sum of \$677.84; that there was still due him from the defendants, and each of them, on the bond and mortgage, the said sum of \$677.84, no part of which had been paid, though he had demanded payment of the same, and concluded his petition with a prayer for a judgment at law against each of the said defendants. On the 8th day of June, 1899, the defendants filed a general demurrer to this petition, which, on the 21st day of November, following, was sustained by the court. Plaintiff elected to stand upon his petition and refused to further plead. Thereupon the court entered a judgment dismissing his said action and taxing him with the costs which had accrued therein. The proper exceptions were taken and allowed, and thereupon the plaintiff brought the case to this court by a petition in error.

The plaintiff contends that the court erred in sustaining the demurrer to his petition and in dismissing his action.

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He claims the right to maintain an action at law after a decree of foreclosure has been rendered, on the note secured by the mortgage, to recover the deficiency remaining on the decree after the sale of the mortgaged property to satisfy the same. This brings us to the consideration of the act of 1897, repealing sections 847 and 849 of the Code, commonly called the deficiency judgment law. It also incidentally requires us to consider section 848 of the Code of Civil Procedure, and its effect upon the right of the plaintiff to maintain his suit.

1. We have recently held in the case of *Merrill v. Miller*, *post*, page 630, that the act of 1897 repealing sections 847 and 849 in no way affects a plaintiff's right to have a deficiency judgment entered in a foreclosure suit on a cause of action accruing prior to, and existing at the time of the taking effect of such repeal. In this case the cause of action accrued and was in existence on and after the 28th day of May, 1894. At any time after that date the plaintiff had the right to commence his suit to foreclose the mortgage and subject the mortgaged property to the payment of the mortgage debt. His cause of action was complete. In the language of the statute, "it existed" from and after the 28th day of May, 1894. This was several years prior to the passage of the act of 1897, repealing the statutes granting the right to enter a deficiency judgment in a foreclosure proceeding. The plaintiff was entitled in his foreclosure suit to have a deficiency judgment entered. So far as appears by this record he concluded to waive such right and bring an action at law for the recovery of the balance due after exhausting the mortgaged property. He is not, therefore, in a position to raise the question as to the validity of the act of 1897, repealing sections 847 and 849 of the Code.

2. It follows that if the plaintiff's right was clear to have a deficiency judgment entered in his foreclosure proceeding, it is also clear that he was entitled in that proceeding, by proper application, to have an order of the court authorizing him to bring his suit at law upon the

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note and coupon bond to recover the balance due thereon. So far as the record shows no such application was ever made by him, or such order obtained. It is not set forth or claimed in his petition that he was ever authorized by the court of equity to proceed in this suit. Section 848, before the repealing act of 1897 was passed, provided that during the pendency of a suit to foreclose a real estate mortgage, or after the rendition of the decree therein, no action at law should be had for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court. The provisions of this section being continued in force as to the plaintiff's cause of action which had accrued and existed prior to the repeal of any part of it, have been construed by this court in the case of *Maxwell v. Home Fire Ins. Co.*, 57 Neb., 207, where it was held that either an action at law for the recovery of the debt secured by a real estate mortgage or a suit to foreclose the mortgage could be maintained at the option of the owner and holder thereof; that when one chooses one remedy he must exhaust it before resorting to the other unless permission of the court is first obtained to pursue both remedies at the same time, and that pending foreclosure suit, or after decree, an action at law on the obligation or evidence of debt of a person other than a mortgagor, such as indorser of a note secured by the mortgage, can not be prosecuted without the consent of the court of equity.

The plaintiff in this case having failed to show by his petition that he had applied for and obtained the consent of the court of equity to commence this action, and there being no allegation in his petition that the district court of Fillmore county had ever authorized him to commence and maintain this suit, the demurrer thereto was properly sustained. So far as the record shows plaintiff may still have his deficiency judgment in the foreclosure suit, or obtain an order of the court authorizing him to prosecute a suit at law to recover a judgment for his deficiency.

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There is no error in the record, and for that reason the judgment of the district court should be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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THE CITY OF LINCOLN V. WILLIAM D. SAGER.

FILED MARCH 5, 1902. No. 11,229.

Commissioner's opinion. Department No. 2.

1. Trial: VIEWING PREMISES: INSTRUCTIONS. *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb., 322, followed.
2. Appeal and Error: INSTRUCTIONS: APPEARANCE IN TRANSCRIPT OF EXCEPTIONS: PRESUMPTION. Where exceptions to instructions appear in the transcript immediately after the charge and before the record of submission to the jury and of the verdict, with an entry showing them to have been filed at the same time with the instructions, and are certified to by the clerk as part of the record of the district court, the same presumption arises as in case of notation by counsel upon the instructions themselves.
3. Appeal and Error: EXCEPTIONS NOT PROPERLY TAKEN TO INSTRUCTIONS: CORRECTING RECORD. In case exceptions are so filed which were not properly taken at the time the instructions were given, they have no place in the record, and the remedy is to correct the record in the district court by striking them therefrom, the same as where exceptions not seasonably taken are noted by counsel upon the written charge.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Reversed*.

*E. C. Strobe*, City Attorney, and *D. H. Flaherty*, for plaintiff in error.

*Halleck F. Rose* and *Wilmer B. Comstock*, contra.

POUND, C.

The judgment of the district court in this case must be reversed for the reasons stated in *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb., 322. The defendant in error requested, and the court gave, the identical instruction

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there considered, and such instruction was excepted to by the city and complained of in its motion for a new trial. It is urged that the record does not show sufficiently that exception was taken to the instruction at the time it was given. In the transcript there are entries of the impaneling of a jury, the trial, the instructions of the court, and "exceptions to instructions" by both parties in order. The transcript recites that these exceptions were filed the same day that the charge was filed. Then follow entries of submission of the cause to the jury and of the verdict and judgment. The clerk certifies that the transcript contains the instructions of the court, the instruction requested by defendant, "exceptions to instructions" and "exceptions of city of Lincoln to instructions," and that they are part of the record of the district court. We see no reason why these written statements by counsel for the respective parties of the exceptions taken, filed with the charge, are not as good evidence as notations by counsel upon the charge made after it comes back with the verdict. Filing of written exceptions separately is certainly less liable to abuse, and is preferred by many trial judges. *State v. Bartley*, 56 Neb., 810, 815. The proper practice is doubtless for the court to note the exceptions. *Blumer v. Bennett*, 44 Neb., 873. But where counsel note exceptions upon the written charge after the verdict has come in, and the court permits such exceptions to go into the record, we presume that the exceptions so noted were made in due season. *Blumer v. Bennett, supra*. In *State v. Bartley, supra*, the written exceptions were indorsed "allowed" by the trial judge. But allowance of exceptions is not necessary under our practice; they need only be taken and noted. Both in *Blumer v. Bennett* and in *State v. Bartley* this court relied chiefly on the fact that the exceptions came before it as part of the record of the district court, duly certified as such. In case exceptions are filed which were not taken at the time the instructions were given, they have no place in the record, and the remedy is to correct the record in the dis-

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strict court by striking them therefrom, the same as where exceptions not seasonably taken are noted by counsel upon the written charge. *Blumer v. Bennett, supra.* We therefore recommend that the judgment be reversed and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

REVERSED AND REMANDED.

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JOHN RATH, SR., v. AUGUSTA C. RATH.

FILED MARCH 5, 1902. No. 11,235.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: CONFLICTING EVIDENCE.** Where there is some competent evidence tending to establish all of the facts constituting plaintiff's cause of action, and the evidence on the whole case is conflicting, the verdict of a jury based thereon will not be set aside on the ground that it is not sustained by the evidence.
2. **Husband and Wife: ALIENATING AFFECTIONS: HONEST ADVICE AS DEFENSE MUST BE PLEADED AND PROVED.** In an action by a wife, against her father-in-law, for alienating the affections of her husband and causing him to abandon her, parental advice, honestly given without malice, and with the intention of benefiting the son, is a defense; but where such advice is not pleaded nor proven at the trial, the court did not err in refusing to give instructions based on that theory.
3. **Trial: INSTRUCTIONS MUST ACCORD WITH ISSUES AND EVIDENCE.** It is a fundamental rule that the instructions in a case must be given with reference to the evidence adduced upon the trial, and must be applicable to the issues made by the pleadings. Instructions asked for not fairly within this rule should be refused.
4. **Appeal and Error: ARGUMENTATIVE INSTRUCTION: PREJUDICE.** Instruction examined and disapproved; but it appearing from the record that the giving of the instruction in no manner affected the verdict of the jury, *held* error without prejudice.
5. **Damages: INSTRUCTIONS AS TO MEASURE OF.** The court is not required to cover the rule as to the measure of damages in any one particular paragraph of its instructions. It will be sufficient if the instructions as a whole correctly state the rule

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6. **Husband and Wife: ALIENATION OF AFFECTIONS: INSTRUCTION AS TO CONTROLLING CAUSE.** In an action by a wife against one, for alienating the affections of her husband, causing him to abandon her, an instruction which informs the jury "That if the conduct of the defendant was the controlling cause which induced her husband to leave her, and that without such conduct her husband would not have abandoned her, then she would be entitled to recover, although there might have been other causes contributing to the same result," is a fairly correct statement of the law. There was no error in giving such an instruction.
7. **Appeal and Error: INSTRUCTIONS REFUSED WHEN POINT COVERED BY COURT.** Error can not be predicated on the failure of the court to give instructions asked for at the trial where the court in its own instruction has amply covered the grounds contained in the requests.

ERROR from the district court for Fillmore county.  
Tried below before HASTINGS, J. *Affirmed.*

*Chas. H. and Frank W. Sloan, for plaintiff in error.*

*George B. France, contra.*

BARNES, C.

On the 30th day of September, 1899, Augusta C. Rath commenced an action in the district court for Fillmore county against John W. Rath, Sr., to recover damages alleged to have been sustained by her by reason of the fact that the defendant had wrongfully, unlawfully and maliciously alienated the affections of her husband from her, and had caused her husband, John Rath, Jr., to leave her, and take with him all of the personal property and money owned by them, the joint earnings of herself and her said husband during the time they lived together as husband and wife. The petition was in the usual form; the allegations of the wrongful acts on the part of the defendant were set forth in the petition, as follows: "The plaintiff further alleges that immediately after said marriage the plaintiff and her husband moved to Clay county near the residence of the defendant and engaged in farming, and shortly thereafter the said defendant, conceiving and harboring an intense dislike for plaintiff, wrongfully and

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maliciously sought to prejudice the mind of the said John Rath, Jr., against the plaintiff and to alienate his affections from her, and has ever since sought and endeavored by subtle contrivances and threats of disinheriting the said John Rath, Jr., to entice him to separate him from the plaintiff and to leave and desert her, and to further his design the said defendant coaxed and persuaded the said John Rath, Jr., in the fall of 1897, to quit the pursuit of farming and to engage in other business, and the said John Rath, Jr., in the fall of 1897, sold and disposed of all his property, being the accumulation of the joint labor and work of the plaintiff and the said John Rath, Jr., during the past two years, and immediately thereafter and on the 28th day of January, 1898, the said John Rath, Jr., left the plaintiff and took with him all the money received from the sale of said property, being about the sum of \$1,000, and the plaintiff ever since the departure of her husband has been unable to ascertain and does not know of his whereabouts. The plaintiff further alleges that the said defendant has sought, by his acts, arts, contrivances and threats, made to the said John Rath, Jr., well knowing that the said John Rath, Jr., was, during all said time, the husband of the plaintiff, and by misrepresenting plaintiff to him, wrongfully and maliciously, to alienate the affections of her said husband from the plaintiff, and wrongfully and maliciously coaxed and enticed him to separate himself from her, whereby the plaintiff has been deprived of the society, comfort, support, aid and companionship of her said husband, and has suffered great distress of body and mind in consequence thereof. By reason of which the plaintiff has been damaged," etc. To this petition the defendant filed an answer which is in substance a denial of all of the facts charged in the plaintiff's petition except the fact of the marriage of his son, John Rath, Jr., to the plaintiff. In addition thereto the defendant averred that he had advised his son, John Rath, Jr., to live with the plaintiff. This allegation, however, amounts to nothing in the way of justification, because, if



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his denials were true, then his defense to the action would be perfect without the allegation mentioned. Justification could only be pleaded in case the defendant, the father of plaintiff's husband, had in good faith, without malice and with intent to benefit and not injure the plaintiff, advised his son not to live with her. No justification of parental advice was pleaded. The reply to the answer was a general denial. Upon these issues the cause was tried and the jury returned a verdict in favor of the plaintiff for the sum of \$500. The defendant thereupon filed a motion for a new trial, which was overruled, and he now brings the case to this court by a petition in error. Hereafter he will be called the plaintiff, and the plaintiff in the court below will be called the defendant.

1. The first error complained of in the plaintiff's brief, and argued by counsel upon the hearing, is that the evidence does not sustain the verdict. It is impossible within the limits of this opinion to set out the evidence or any particular portion thereof. It is sufficient to say that we have examined the record and read all of the evidence carefully; that the defendant produced evidence upon her part, by herself and other witnesses, tending to establish the averments contained in her petition. The plaintiff testified on his own behalf, and his testimony is consistent with the averments of his answer; in fact he denied every particle of evidence that was adduced against him by the defendant. Other evidence was introduced by him, by which he sought to, in some measure, corroborate his statements. Upon nearly all of the issues there was a conflict of evidence, and we are unable to say that it was not sufficient to sustain the verdict. Where there is a conflict of evidence upon all of the material issues in a case, and the jury has passed upon the weight and the preponderance thereof and returned a verdict, it is not the province of this court to disturb it. We therefore decline to set aside the verdict upon this ground.

2. It is contended that the court erred in giving the second instruction, because in the statement of the issues

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reference to that part of the answer alleging that John Rath, Sr., gave advice to his son to live with the defendant in error was omitted. We think that this instruction fairly stated the issues in the case; the advice which the plaintiff in error alleged he gave to his son, to-wit, to live with the defendant, was in no way material. If, as he claimed in his answer, he never performed any of the acts charged against him in the petition, his defense was full and complete, and the allegation that he advised his son to live with defendant was surplusage. Therefore, there was no error in giving the second instruction which ignored that theory. It is urged that in place of the second instruction the court should have given the first instruction asked for by the plaintiff, which is as follows: "The jury is instructed that a father may, at the request of a son of mature years, advise said son as to his interests and course which the son should pursue in reference to the son's business course in life, even to the advising the son to separate from his wife, and no liability will result therefrom against the father, unless he, the said father, through malice or evil motive, should resort to such means, such as fear or threat of disinheritance, as would unduly influence the said son to accomplish the separation which would not have taken place but for the resort to such means on the part of the father." In an action by a wife against her father-in-law for damages caused by the alienation of the affections of her husband, and inducing him to abandon her, parental advice to leave the plaintiff given in good faith without malice and with the intention of benefiting the son, properly put in issue by the pleadings, and proven upon the trial is a defense. It is a fundamental principle governing the giving of instructions that they must be given with reference to the evidence adduced upon the trial, and must be applicable to the issues made by the pleadings in the case. This instruction was directed to matters of defense which were not pleaded, and upon which there was no evidence. The court therefore properly refused this instruction.

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3. It is contended that the court erred in giving the sixth instruction upon his own motion, for the reason that he ignored the answer and left open the reasonable inference that the father had no right to even advise favorably or unfavorably the proposed separation. In answer to this it is enough to say that the question of parental advice was not in this case either by the pleadings or the evidence.

4. The plaintiff contends that the court erred in giving the second instruction asked by the defendant. The instruction is as follows: "The jury are instructed that an action lies in favor of the wife against any one who alienates the affections of her husband from her. Ground of such action is the infliction on the wife of the following injuries: (1) The loss of the husband's affections. (2) The loss and comfort of his society. (3) The loss of his support and care of her where he abandons her. (4) The mortification and shame that must surely follow these domestic wrongs. The extent of the injury generally depends upon the previous relations of the parties, and if these relations were cordial and affectionate, the wrong of one who succeeds in withdrawing the husband's affections from the wife, it is impossible almost to adequately measure. In such cases it is the duty of the jury to give such damages to the wife as may seem just and reasonable." The first part of this instruction is correct; but we do not feel warranted in giving our full approval to the language: "the wrong of one who succeeds in withdrawing the husband's affections from the wife, it is impossible almost to adequately measure." This language is certainly too argumentative, and by its terms likely to inflame the minds of the jurors against a defendant and cause them to return an excessive verdict. Hence we can not give it our unqualified approval. But where the giving of an instruction, which may not be technically correct, is followed by no act of the jury which would indicate that it in any manner influenced them in arriving at a verdict, the giving of such an instruction will be held to be error without

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prejudice. In this case the verdict of only \$500 is so small that we can safely say that the giving of this instruction in no manner influenced the minds of the jurors upon the question of the measure of damages. We therefore hold that the giving of this instruction was error without prejudice, and for which a new trial will not be ordered.

5. It is alleged that there was prejudicial error in giving instruction No. 3, asked by the defendant, in that the instruction does not give the correct rule for the measurement of damages. An examination of this instruction will show that by it no attempt was made to lay down the rule for the measurement of damages. The instructions of the court, as a whole, fairly state such rule, and in the giving of this instruction the court did not err.

6. It is urged that the court erred in giving instruction No. 6, asked by the defendant. The instruction is as follows: "The jury are instructed that if the conduct of the defendant was the controlling cause which induced the husband to leave his wife, the plaintiff, and if the jury are satisfied that but for the conduct of the defendant he would not have left the plaintiff, plaintiff is entitled to recover, although there might have been other causes contributing to the same result." We think there was no error in giving this instruction. By it the jury were plainly told that the conduct of the defendant must have been the controlling cause, and that if without such conduct, plaintiff's husband would not have left her, then she would be entitled to recover. We think this is a plain and correct statement of the law relating to the alleged conduct of the defendant.

7. The failure to give the second instruction asked by the plaintiff is urged as error. We think that this instruction together with instruction No. 6, asked by the plaintiff, were properly refused. The propositions contained in each of them were amply covered by the instructions of the court given upon his own motion, and couched in much better language than those tendered by the plaintiff. In the petition in error quite a number of assignments are set

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forth alleging errors in receiving and rejecting evidence during the trial. These assignments were evidently abandoned by the plaintiff in error, because they are not mentioned in his brief, neither were they adverted to upon the hearing. We have examined all of these assignments, and upon a careful reading of the evidence and an examination of the rulings of the court upon the trial, we believe that no substantial error was committed in receiving or rejecting any of the evidence offered, or contained in the bill of exceptions.

A thorough examination of the record convinces us that the case was fairly tried, and was submitted to the jury upon proper and suitable instructions; that the verdict is sustained by the evidence, and therefore the judgment of the district court should be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY  
V. MARY M. HAMBEL, EXECUTRIX OF THE ESTATE OF  
WILLIAM O. HAMBEL, DECEASED.

FILED MARCH 5, 1902. No. 11,236.

Commissioner's opinion. Department No. 1.

1. **Railroads: ACTION FOR PERSONAL INJURIES: STATUTES.** By section 3, article 1, chapter 72, Compiled Statutes, a right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury is occasioned by his own criminal negligence, or by his violation of some express rule or regulation of the carrier actually brought to his notice. *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb., 689, followed.
2. **Railroads: ACTION FOR PERSONAL INJURIES: TAKING PROPERTY WITHOUT PROCESS: STATUTES: CONSTITUTION.** Section 3, article 1, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment to the constitution of the United States, nor to section 3, article 1, of the constitution of this state, as tending to deprive railroad companies of their property without due process of law. *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb., 689, followed.

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3. **Railroads: LIMITATION OF LIABILITY: EXCEPTIONS: STATUTES.** Section 3, article 1, chapter 72, Compiled Statutes, prevents any limitation on the liability of a railroad company for a passenger's safety unless within the exceptions provided in the section, and section 5 of the same chapter does not impliedly give the right to a railway company to limit its liability under section 3 by stipulation.
4. **Damages: CARLISLE TABLE AS EVIDENCE.** A table showing the expectancy of life in healthy persons of different ages, printed in a law book of general acceptance and authority in courts of this state, as the Carlisle table of expectancy, is admissible in evidence in cases where such evidence is applicable. *Sellers v. Foster*, 27 Neb., 118, followed.
5. **Damages: ACTION FOR DEATH: VALUE OF ESTATE.** In an action to recover damages for the death of a person it is incompetent for the defendant to show what the value of the estate of the deceased was.
6. **Appeal and Error: EVIDENCE: DAMAGES FOR PERSONAL INJURIES.** Evidence examined, and *held* to support the judgment.

ERROR from the district court for Jefferson county. Tried below before LETTON, J. *Affirmed*.

*W. F. Evans, L. W. Billingsley, R. J. Greene and M. A. Low*, of counsel, for plaintiff in error.

*Jno. Heasty, contra.*

DAY, C.

On August 9, 1894, William O. Hambel was killed in a railroad wreck while a passenger upon one of the trains of the Chicago, Rock Island & Pacific Railway Company. The cause of the wreck was the criminal act of a third person and was not attributable to any fault or negligence upon the part of the railway company. His executrix brought this action in the district court for Jefferson county to recover damages therefor, and upon the trial recovered a judgment for \$5,000, to review which the defendant has brought the case to this court on error.

A vigorous argument is made assailing the constitutionality of section 3, article 1, chapter 72, of the Compiled Statutes, which declares: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the

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person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The constitutionality of this section has been considered by this court and passed upon adversely to the contention of the defendant.

In *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb., 689, a case arising out of the same wreck as the case at bar, it was held that "section 3, article 1, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment of the constitution of the United States, nor to section 3, article 1 of the constitution of this state, as tending to deprive railroad companies of their property without due process of law." This case was taken on a writ of error to the supreme court of the United States and has recently been affirmed by that court. The validity of the statute has also been upheld in *Union P. R. Co. v. Porter*, 38 Neb., 226; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb., 578; *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb., 678. We adhere to the rule as announced in these cases.

Upon the trial the defendant offered to show that the deceased at the time he was killed was riding upon a free pass issued to him as a gratuity and that by the terms thereof he assumed all risks of accidents and also agreed that the company should not be liable for injuries to his person while using the same. We think the trial court was right in excluding this testimony. This precise question was before this court in *Chicago, R. I. & P. R. Co. v. Collier*, 1 Neb. [Unof.], 278. In that case it was held that the provisions of section 3 of chapter 72, article 1, above quoted, prevent any limitation on the liability of a railroad company for a passenger's safety unless within the exceptions provided in the section, and that section 5 of the same chapter did not impliedly give the right to a railway company to limit its liability under section 3, by stipulation. Without being discussed, the same rule is an-

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nounced in *Missouri P. R. Co. v. Tietken*, 49 Neb., 130, and *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb., 275.

It is also urged that the court erred in admitting in evidence, over the objection of the defendant, the Carlisle table of expectancy as found on page 439 of Maxwell's *Practice in Justices' Courts* [7th ed.]. This book was competent evidence for the purpose of establishing the fact sought to be proved. In *Sellars v. Foster*, 27 Neb., 118, this court, referring to the introduction in evidence of the Carlisle table in Judge Maxwell's *Pleading and Practice*, said: "A table showing the expectancy of life in healthy persons of different ages, printed in a law book of general acceptance and authority in the courts in this state, as the Carlisle table of expectancy, is admissible in evidence in cases where such evidence is applicable."

The defendant also predicates error upon the refusal of the court to permit it to show the value of the estate left by the deceased, and it made offer to show that the estate was valued at \$50,000. This evidence, we think, was immaterial and properly refused. The rule is so well expressed by Judge Cooley in *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich., at page 214, that we quote therefrom with approval as follows: "What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime; and to show that the family was poor has no tendency toward showing whether this was or was likely to be, large or small. One man contributes liberally in aid of his poor relatives; another delights in contributing luxuries where comforts are already abundant; but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount, must, when lost, be compensated to the same extent whether the loser be rich or poor." The testimony shows that the deceased was a practicing attorney forty-



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six years old, with an expectancy, as shown by the Carlisle table, of 23.82 years; that he earned about \$5,000 per annum and spent of his income in support of his family from \$1,500 to \$2,000 per year. The testimony, in our opinion, amply sustains the judgment.

There are other assignments of error alleged in the petition which we do not deem necessary to discuss. Suffice it to say that we do not think them well taken. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS, C., concurs. KIRKPATRICK, C., not sitting.

AFFIRMED.

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EDGAR F. SMITH ET AL. V. JOHN G. BOWERS ET AL.

FILED MARCH 5, 1902. No. 11,243.

Commissioner's opinion. Department No. 3.

1. **Replevin: ACTION ON BOND: MATTERS CONCLUDED BY JUDGMENT IN REPLEVIN.** In an action upon a replevin bond the right of possession of the goods taken and the value of that possession will be treated as matters conclusively determined by the verdict and judgment in replevin.
2. **Replevin: ACTION ON BOND: PLEADING EXCUSE FOR BREACH.** In an action upon a replevin bond, matters in excuse of a breach of the condition of the bond can not be availed of as a defense unless they are specially pleaded.

ERROR from the district court for Lancaster county.  
Tried below before CORNISH, J. *Affirmed.*

*George A. Adams*, for plaintiffs in error.

*John S. Bishop* and *A. S. Tibbets*, *contra*.

AMES, C.

This is a suit upon a replevin bond. The replevin action was brought by one Don Carlos to recover certain goods from the possession of the defendants in error, Bowers and others, who held them under execution levies against one Easterley, and the instrument in suit was executed on

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behalf of the plaintiff in that action. On the trial of the replevin action the jury found the right of possession of certain of the goods at the commencement of the suit to have been in the defendants and the value of said goods at that time to have been \$150, and the value of the defendant's right of possession thereof \$160.11. Upon this verdict a judgment was rendered for a return of the property, or, in case a return thereof could not be had, for a hundred and fifty dollars, their value as found by the jury. Execution upon the judgment having been returned unsatisfied the defendant in replevin brought this action upon a petition alleging the facts, so far as necessary, substantially as above recited, together with other matter showing a breach of the condition of the bond. The answer, so far as it now calls for consideration, consists of denials and of an allegation that the goods had been returned. Upon a trial a verdict and judgment were rendered for the plaintiffs, and the defendants, who were sureties upon the replevin bond, bring the case here by petition in error for review. A large number of alleged errors are assigned, but they are centered upon the single objection that the defendants below were not permitted to avail themselves, as a defense, of the alleged fact that certain of the goods were not the property of the defendants in execution.

Whether, if such was the fact and the goods had, pending the replevin action or afterwards, been forcibly taken by the true owners, these matters might have been successfully pleaded in mitigation of damages, it is not necessary now to decide, because no such issue was tendered by the answer. The right of possession of the goods and the value of that right were conclusively determined in the replevin action and are matters not open to inquiry in this suit.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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EDGAR F. SMITH ET AL. V. JOHN G. BOWERS ET AL.

FILED JULY 22, 1902. No. 11,243.

Commissioner's opinion. Department No. 3.

**Replevin: SUIT ON BOND: ALLEGATIONS IN ANSWER: PROOF IN MITIGATION OF DAMAGES.** Under an answer in a suit on a replevin bond, which consists only of denials and an allegation that the goods have been returned, the defendants are not entitled to prove, in mitigation of damages, that the goods, or part of them, which were taken in execution by a sheriff, were not the property of the execution defendant.

REHEARING of case reported *ante*, page 611.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Judgment below affirmed.*

*George A. Adams*, for plaintiffs in error.

*John S. Bishop* and *A. S. Tibbets*, *contra*.

AMES, C.

At a former hearing of this case it was decided, *ante*, page 611, 89 N. W. Rep., 596, that under an answer, in a suit on a replevin bond, which consists only of denials and an allegation that the goods have been returned, the defendants are not entitled to prove, in mitigation of damages, that the goods or a part of them, which were taken in execution by a sheriff, were not the property of the execution defendant. A rehearing was granted to afford the plaintiffs in error an opportunity to show, if they were able so to do, that this court erred in so deciding. Neither in his brief nor orally, upon the rehearing, did counsel urge any argument or cite any authority to such effect. We have, therefore, no reason to doubt that the former decision was right.

It is recommended that the former decision of this court be adhered to and the judgment of the district court affirmed.

DUFFIE and ALBERT, CC., concur.

JUDGMENT BELOW REAFFIRMED.

Hannah v. Perkins.

CHARLES H. HANNAH ET AL. V. JAMES H. PERKINS.

FILED MARCH 5, 1902. No. 11,246.

Commissioner's opinion. Department No. 2.

**Judgment:** LIEN: HOMESTEADS: EXEMPTIONS. *Duell v. Potter*, 51 Neb., 241, followed in a case of the same nature.

**ERROR** from the district court for Hitchcock county. Tried below before NORRIS, J. *Reversed and action dismissed.*

*W. R. Starr*, for plaintiffs in error.

*Talbot & Allen, contra.*

POUND, C.

This case is in all essential particulars the same as *Duell v. Potter*, 51 Neb., 241, and must be governed by the decision therein. It follows that the petition did not state a cause of action, and when plaintiff demurred to defendants' answer the court should have so ruled. *Barr v. Little*, 54 Neb., 556. The decree finding defendants' judgment no lien upon the property in controversy and in effect enjoining sale thereof under the judgment should be reversed and the action should be dismissed.

BARNES and OLDHAM, CC., concur.

**REVERSED AND ACTION DISMISSED.**

McKinney v. Glassburn.

**JOHN MCKINNEY ET AL., EXECUTORS OF THE LAST WILL  
AND TESTAMENT OF ALFRED BAMBER, DECEASED, AP-  
PELLEES, V. LEMUEL P. GLASSBURN, APPELLANT.**

**FILED MARCH 5, 1902. No. 11,256.**

**Commissioner's opinion. Department No. 3.**

- 1. Judicial Sale: TIME FOR OBJECTING TO APPRAISAL.** Objections to the appraisement of real estate sold at judicial sale, to be available, must be made before sale.
- 2. Judicial Sale Set Aside: APPRAISAL ON SECOND SALE.** Where the first judicial sale is set aside it is the duty of the sheriff to proceed to sell without a new appraisement, unless such appraisement has been set aside, and an order of the court directing him to sell on such appraisement, though unnecessary, is not error.
- 3. Mortgage Foreclosure: NECESSITY OF ORDER OF SALE OR COPY OF DECREE AS AUTHORITY TO MAKE SALE.** A decree of foreclosure is the authority of the officer to proceed to sell the property in satisfaction of such decree, and neither an order of sale nor a copy of the decree in his hands is essential for the exercise of such authority.

**APPEAL** from the district court for Wheeler county.  
Tried below before **KENDALL, J.** *Affirmed.*

**T. J. Doyle,** for appellant.

**Clements Bros.,** contra.

**ALBERT, C.**

This is an appeal from an order confirming a sale of real estate sold under a decree of foreclosure. An order of sale issued December 31, 1898. On March 27, 1899, the premises were appraised, and on the 2d day of May, following, sold. Thereafter the appellant filed a motion to set aside the appraisement and sale. The motion is not included in the record. It was overruled as to the appraisement, but sustained as to the sale. The sale was set aside and the sheriff directed to proceed to sell under the appraisement already made. A second order of sale issued, in pursuance of which the premises were sold on the 28th day of

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August, 1899. This sale was confirmed, over the objections of the appellant.

Two grounds are urged in the argument for a reversal of the order of confirmation: first, that the court erred in directing a resale on the appraisement made under the first order of sale; and, second, that no copy of the decree accompanied the order of sale under which the sale was made. The objections to the appraisement, in each instance, were made after the respective sales. Under the repeated rulings of this court, they came too late. The motions to set aside the appraisement were, therefore, properly overruled. That being true, when the first sale was set aside, had the court made no order directing the sheriff to sell under the appraisement already made, it would have been the duty of the sheriff to so sell. *Hubbard v. Draper*, 14 Neb., 500; *Beardsley v. Higman*, 58 Neb., 257. It will hardly be claimed that it is prejudicial error for the court to direct the sheriff to do what it had been his duty to do without direction. The second ground is equally untenable. The decree itself is the sheriff's authority to make the sale. It is spread upon the record. Neither an order of sale, nor a copy of such sale, in the hands of the sheriff, adds in the slightest degree to the authority already vested in him by virtue of the decree itself.

It is recommended that the order complained of be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

Nehawka Bank v. Ingersoll.

**THE NEHAWKA BANK, APPELLEE, v. F. T. INGERSOLL ET AL.,  
IMPLEADED WITH THE PACKERS' NATIONAL BANK OF  
SOUTH OMAHA, APPELLANT.**

FILED MARCH 5, 1902. No. 11,268.

Commissioner's opinion. Department No. 2.

1. **Courts: GENERAL JURISDICTION: PRESUMPTION IN ABSENCE OF AFFIRMATIVE SHOWING.** In the absence of an affirmative showing in the record a court of general jurisdiction will be conclusively presumed to have jurisdiction of the parties to the action.
2. **Banks and Banking: DEBTOR AND CREDITOR: DEPOSITS: DUTY TO HONOR CHECKS.** Deposits in a bank create between it and the depositor the relation of debtor and creditor; and as long as this relation exists the bank is in duty bound to honor the checks of the depositor, and it can not refuse to do so on the ground that the money deposited belongs to some other person, or that the title of the depositor to it is defective.
3. **Banks and Banking: APPROPRIATING TRUST FUND: LIABILITY.** But if the bank appropriates the trust fund to the payment of a debt due the bank from the trustee, it would be liable therefor.
4. **Banks and Banking: KNOWLEDGE OF OUTSTANDING DRAFT: RIGHT TO RETAIN DEPOSIT.** Knowledge by the bank that a draft has been drawn on the depositor and is outstanding would not justify a refusal by the bank to pay out the money deposited when demanded by the depositor; the law would not allow the bank to set up a *jus tertii* against the demand.
5. **Corporations: HOW MAY ACT: HOW BOUND BY NOTICE.** A corporation can act only by its agents who are empowered to act for it, and can only be bound by notice to some of its officers or agents who have the power to act upon the notice, or to one whose duty it is to communicate the notice to its officers or agents who have this power.

APPEAL from the district court for Cass county. Tried below before RAMSEY, J. *Reversed in part, dismissed in part.*

*C. J. Smyth*, for appellant.

Even if the bank of deposit knew that the deposits belonged to the plaintiff it was its duty to pay the money out upon the checks of the depositor, and it can not be

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held responsible for having done so: *Adams v. Citizens Bank*, 84 Fed. Rep., 270; Morse, Banks and Banking, section 317; *Cady v. South Omaha National Bank*, 46 Neb., at page 764; *Walker v. Manhattan Bank*, 25 Fed. Rep., 255; *McLaughlin v. First National Bank*, 43 N. W. Rep. [S. Dak.], 715, 716; *Rock Springs National Bank v. Luman*, 42 Pac. Rep. [Wyo.], 514; *Duckett v. National Mechanics' Bank*, 86 Md., 400; *Goodwin v. American National Bank*, 48 Conn., 551; *Pederson v. South Omaha National Bank*, 52 Neb., 95; *Munnerlyn v. Augusta Savings Bank*, 88 Ga., 333; *Freeholders of Essex v. Newark National Bank*, 48 N. J. Eq., 51; *State National Bank v. Reilly*, 124 Ill., 464; *Howard v. Deposit Bank of Owensboro*, 80 Ky., 496.

*Samuel M. Chapman and John A. Davies, contra.*

On the theory that the deposit bank was liable because the money on deposit was a trust fund and the bank had notice or knowledge that a breach of the trust was being committed by an improper withdrawal of such fund, counsel for appellee cite the following cases: *Cady v. South Omaha National Bank*, 46 Neb., 756; *Gillespie v. Union Stock Yards National Bank*, 41 Fed. Rep., 231; *Munnerlyn v. Augusta Savings Bank*, 88 Ga., 333; *State National Bank v. Reilly*, 124 Ill., 464; *Freeholders of Essex v. Newark National Bank*, 48 N. J. Eq., 51; 3 Am. & Eng. Ency. Law [2d ed.], 833, 834; *Walker v. Manhattan Bank*, 25 Fed. Rep., 255; *Swift v. Williams*, 68 Md., 237.

OLDHAM, C.

The Nehawka Bank (hereinafter designated as plaintiff) brought this action in the district court for Cass county against F. T. Ingersoll, Dorsey Bros. & Co., and the Packers' National Bank of South Omaha, the purpose of which was to charge the Packers' National Bank with the conversion of an alleged trust fund that passed through its hands and which is alleged to have belonged



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to the plaintiff. All the defendants were summoned, but all except the Packers' National Bank defaulted. This bank first filed a special appearance and afterwards its answer, and a trial was had between it and plaintiff, and for brevity we will hereinafter designate it the defendant. The petition is lengthy, but a synopsis of the material allegations are that Dorsey Bros. & Co. were a commission firm engaged in selling live stock on a commission in South Omaha at the stock yards; that in May, 1893, they gave Ingersoll a letter of credit to the plaintiff, in substance telling plaintiff that if it would furnish Ingersoll the money to buy from one to three cars of cattle they would pay his drafts therefor; that this letter was presented and that Ingersoll was furnished the money by plaintiff to buy one car load of cattle, with the additional agreement that when the cattle were shipped they should be consigned to Dorsey Bros. & Co., and that Ingersoll should draw his sight draft in favor of the plaintiff on said Dorsey Bros. & Co. for the amount of the money so furnished; that the cattle were shipped and the draft drawn as agreed; that the sum so advanced was \$784.50; that Dorsey Bros. & Co. transacted all of their financial business with the said defendant bank; that the stock arrived in South Omaha and was sold by said Dorsey Bros. & Co. on the market; that said Dorsey Bros. & Co. received for the stock weight tickets (which seemed to be used in place of and equivalent to checks from the purchasers) which were turned over to defendant bank for collection and were collected by it; and at the time of the deposit and collection of these weight tickets the defendant then knew that Dorsey Bros. & Co. were insolvent and were selling stock belonging to other parties and that the proceeds thereof did not belong to them; and it was their duty to remit the proceeds of the sale, less their commission, freight and yardage fees, to the shippers of the stock; that the defendant knew of the existence of this draft and with this knowledge applied the proceeds of said weight tickets to the payment of an overdraft of

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Dorsey Bros. & Co. at the defendant bank; that of the proceeds from the sale of these cattle received and applied by the defendant bank, \$784.50 thereof was a trust fund for the payment of this draft. It alleges a demand for the amount claimed and a refusal to pay by the defendant bank; alleges a wrongful appropriation of this fund and prays that all of said defendants be compelled to account to the plaintiff for said money. The defendant filed a special appearance challenging the jurisdiction of the court, alleging, in substance, that the defendant bank is a resident of South Omaha, Douglas county, and the summons was issued from Cass county; that Ingersoll and Dorsey Bros. & Co. are not actual defendants and have no interest in suit adverse to the plaintiff. These objections do not appear from the record to have been ruled upon by the court. It afterwards filed its answer renewing the objections to the jurisdiction of the court and, after admitting that Dorsey Bros. & Co. were engaged in the commission business in South Omaha, alleges that whatever money was deposited with defendant bank by the said Dorsey Bros. & Co. was deposited in the regular course of business in the name of Dorsey Bros. & Co. and was subject to their check, and all of said money deposited was checked out of defendant bank by said Dorsey Bros. & Co. in the usual course of business on or before the 8th day of May, 1893, and denies the other allegations of the petition. To this answer a general denial was filed by the plaintiff and these issues were tried to the district court for Cass county and terminated in a judgment in favor of the plaintiff and against the defendants for the full amount claimed in the petition. From this judgment the defendant bank appeals to this court.

The first point urged by the appellant is that the district court for Cass county did not acquire jurisdiction over it by the service of summons issued out of the district court for Cass county and served upon it in Douglas county. This objection is based on the theory that Inger-

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soll was an improper party to the suit. There is nothing in the record that shows when, where, nor by what means service was had on any of the defendants. The record shows that Ingersoll and Dorsey Bros. & Co. (who were sued in their individual capacity) were defaulted and that the court, in its findings on which the judgment is based, finds "that due notice of the pendency of the said action was had on all the defendants, and that F. T. Ingersoll, George W. E. Dorsey, H. H. Dorsey and J. M. Marsh by their default admit the facts stated in the said petition to be true." That the firm of Dorsey Bros. & Co. was comprised of H. H. Dorsey, George W. E. Dorsey and J. M. Marsh and that this suit was against them in their individual capacity is not controverted. And we agree with the contention of the appellant's counsel that Ingersoll was not a necessary party and that he could not be used as a basis of jurisdiction for the reason that this was an action for an accounting and it is not charged in the petition nor claimed by the evidence that he had any of the trust funds in his hands, in fact the petition shows on its face that he did not and never had; and in no phase of the case as made by the petition could he be a necessary party, for no one could be held to account for a fund of which he had neither the control nor the custody. But on the other hand the firm of Dorsey Bros. & Co. were proper parties, and as the record is silent as to the county in which they were summoned it will be presumed that they were summoned in the county which gives the court jurisdiction. In the absence of an affirmative showing in the record a court of general jurisdiction will be conclusively presumed to have jurisdiction of the parties to the action.

The next proposition which we shall consider is: Are the facts proven sufficient to charge the defendant bank with a conversion of this money? The testimony is short and is not conflicting on any point. It shows the furnishing of the money by the plaintiff, the drawing of the draft by Ingersoll, the shipment and the sale of the cattle

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on the 6th day of May by Dorsey Bros. & Co., the deposit of the weight-slips by Dorsey Bros. & Co. in the defendant bank and the collection of the proceeds of the sale by the defendant bank and the paying out of this and other moneys of Dorsey Bros. & Co. on their checks to various parties, none of whom are designated.

The books of the defendant bank were introduced in evidence and showed the state of the account of Dorsey Bros. & Co. at the bank during this period as follows:

On May 6, at opening of business, on hand to the credit of Dorsey Bros. & Co.....	\$1,069 84
Deposits on that day.....	4,306 13
Total .....	\$5,375 97
Checks paid out that day by bank.....	2,195 64
Balance to credit of Dorsey Bros. & Co. at close of business that day.....	\$3,180 33
May 7th was Sunday.	
May 8, at opening of business, to the credit of Dorsey Bros. & Co.....	\$3,180 33
Deposits on this day.....	2,583 46
Total .....	\$5,763 79
Checks paid by the bank.....	6,781 96
Overdraft .....	\$1,018 17

On May 10 Dorsey Bros. & Co. failed and suspended business, with their account with the defendant bank in the above condition. There is no testimony whatever that the defendant bank applied any of this money on any indebtedness owing it by Dorsey Bros. & Co., but on the other hand the uncontroverted testimony of the cashier of this bank is that every dollar paid on May 6 and 8, as shown by the above tabulation, was paid on the checks of Dorsey Bros. & Co. issued to and held by other parties and not one cent thereof was retained by the bank. It therefore appears by the record, without contradiction or dispute, that the defendant bank paid out this money in

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the regular course of business to other parties on the checks of Dorsey Bros. & Co.

Deposits in a bank create between it and the depositor, or the person to whom the credit for the deposit is given, the relation of debtor and creditor. So where a bank receives money from a person and gives him credit therefor it is in duty bound to honor his checks to the amount of such deposit, and it can not refuse to honor his checks or drafts against the fund on the ground that the money deposited belonged to some other person, or that the title of the depositor to it is defective. These are matters in which the bank is not interested or concerned until the third party who claims to own the fund shall proceed to enforce his rights. *McLaughlin v. First National Bank*, 43 N. W. Rep. [Dak.], 715; *First National Bank v. Mason*, 95 Pa. St., 113; *National Bank v. Insurance Co.*, 104 U. S., 54; *Rock Springs National Bank v. Luman*, 42 Pac. Rep. [Wyo.], 874; *Walker v. Manhattan Bank*, 25 Fed. Rep., at page 255; Morse, Banks and Banking, section 317. This rule applies to the deposit of trust funds the same as it does to individual funds deposited.

Mr. Morse, in his work on banking, *supra*, says: "Supposing that the banker becomes incidently aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of the trust, and draws a check for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and a third person." And in the case of *Walker v. Manhattan Bank*, 25 Fed. Rep., 247, the court says: "A banker can not question the right of his customer by refusing to honor his demands by check or otherwise, upon any theory that it is the banker's duty to look after the appropriation of the trust funds when withdrawn from the bank, and to protect the trust by setting up a *jus tertii* against the demand. \* \* \*

"This would be to make every trustee accountable for his conduct in the trust to every agent whom he happened

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to employ, and would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length.'” The rule, however, is otherwise where the banker appropriates the money to the payment of a debt due the bank from the trustee, as was the case in *Cady v. South Omaha National Bank*, 46 Neb., at page 764.

In *Rock Springs National Bank v. Luman, supra*, the court in speaking of the duty of the bank in this respect, said: “And it had the right, even with knowledge, through its officer, of the trust character of the fund transmitted to it by Pfeiffer, to place the amount to his credit, and even to pay his checks drawn on it, not payable to itself, or passing to it with such knowledge; but it had no right to participate in the wrongful diversion of the fund and pay itself out of the proceeds of the draft. A banker is not required to protect the rights of third parties, or to initiate any inquiry between him and the customer.”

In *Duckett v. National Mechanics' Bank*, 86 Md., 400, the court said: “The obligation of the bank is simply to keep the fund safely and return it to the proper person or to pay it to his order. If it be deposited by one as trustee, the depositor as trustee has the right to withdraw it, and the bank, in absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon the bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee, or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversation of its depositors who occupied some fiduciary relation to the fund placed by them with the bank.”

*Goodwin v. American National Bank*, 48 Conn., 551, was a case in which the court said: “The contract of a bank with a depositor is that it will pay his checks upon

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his funds in the bank, and if the checks are properly drawn it is bound to pay them. The law will not charge the officers of a bank with knowledge that a depositor is committing a fraud, nor impose upon them the duty of inquiry simply because he is drawing upon a trust account checks payable to himself, or is transferring funds from the trust account to his private account." In line with the foregoing decisions are *Munnerlyn v. Augusta Savings Bank*, 88 Ga., 333; *Freeholders of Essex v. Newark National Bank*, 48 N. J. Eq., 51; *State National Bank v. Rcilly*, 124 Ill., 464; *Howard v. Bank of Owensboro*, 80 Ky., 496.

From the principles above enunciated it would seem clear that it was the duty of the defendant bank to pay this money out on the checks of Dorsey Bros. & Co., and it is an elemental rule of law that a person can not be chargeable for performing his duty.

There was an attempt to prove that the defendant bank had notice that this draft in question had been drawn and was outstanding at the time the weight tickets were deposited. This fact seems to be strongly relied upon as a factor to charge this bank by the counsel for appellee. Why it should does not clearly appear. It was drawn not on this bank but on Dorsey Bros. & Co., and there was nothing, as disclosed by this record, that would lead this bank to believe at this time that it would not be paid by them in the regular course of business. And even if it did believe and had reason to believe that Dorsey Bros. & Co. would not pay this draft, it could not refuse to pay out the money, if demanded by the party who deposited it. This would be setting up a *jus tertii* against the demand which the law does not allow. But the evidence of this notice is weak. Marsh (the only witness who testifies on this point) swears that at the time the weight tickets were gathered up to be deposited he stated to the collector of them that a draft in favor of the Nehawka bank had been drawn against the proceeds of this sale. It is not pretended that this collector was the cashier or other



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managing officer of the bank, but was in reality a messenger boy who was employed by the bank to wait upon its customers for this purpose. There is no evidence that this collector imparted any of this information to the cashier or to any other person, nor does it appear that it was a part of his duty to do so. A corporation can act only by its agents who are empowered to act for it, and can only be bound by notice to some of its officers or agents who have the power to act upon the notice, or to one whose duty it is to communicate the notice to the officers who have this power.

We have considered this case on the theory that this was a trust fund, the theory most favorable to the plaintiff bank; but even on this theory we can find no reason for holding the defendant bank liable in this action.

It is therefore recommended that the judgment of the district court as against the defendant bank be reversed and the petition as against the said defendant bank be dismissed.

BARNES and POUND, CC., concur.

The judgment of the district court as against the Packers' National Bank of South Omaha is reversed and the petition as against the said Packers' National Bank of South Omaha is dismissed.

REVERSED IN PART, DISMISSED IN PART.

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WILLIAM H. MILES ET AL. V. HARRIET L. DEMING, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF ERASTUS A. DEMING, DECEASED.

FILED MARCH 5, 1902. No. 11,275.

Commissioner's opinion. Department No. 1.

**Appeal and Error: REVIEW OF EQUITY CAUSE ON ERROR: MOTION FOR NEW TRIAL.** In order to review the proceedings in the trial of an equity cause by petition in error a motion for a new trial must be filed in the district court the same as in an action at law. *Gaughran v. Crosby*, 33 Neb., 33, followed.



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ERROR from the district court for Frontier county. Tried below before NORRIS, J. *Affirmed.*

*J. L. White and S. A. Searle*, for plaintiffs in error.

*W. S. Morlan and J. S. Phillips*, *contra.*

DAY, C.

This case was before this court upon a former hearing, being reported in 35 Neb., 739, wherein it was ordered that the district court enter a decree of foreclosure and sale only of the life estate of the defendant in the mortgaged premises. On September 14, 1893, pursuant to this order, a decree was entered by the district court for Frontier county. An order of sale was issued, the premises appraised and sold, and objections to the confirmation filed by defendants. On March 14, 1899, the objections to the confirmation were overruled and the sale confirmed. From this order of confirmation the defendants have brought the case to this court by proceedings in error.

The petition in error and the transcript were filed in this court March 14, 1900. There is but one error assigned in the petition in error, which is as follows: "The court erred in overruling the objections to the confirmation of said sale." We are precluded from examining the alleged error because no motion for a new trial was filed in the lower court. The rule is well established that where a suit in equity is brought to this court for review by proceedings in error, the errors complained of must have been brought to the attention of the district court by a motion for a new trial. *Carlow v. Aultman & Co.*, 28 Neb., 672; *Gaughran v. Crosby*, 33 Neb., 33; *Scroggin v. National Lumber Co.*, 41 Neb., 195; *Farmers Loan & Trust Co. v. Davis*, 42 Neb., 46; *Hansen v. Kinney*, 46 Neb., 207; *Storey v. Burns*, 53 Neb., 535.

In error proceedings where there is no motion for a new trial the record will be examined only to ascertain whether the pleadings support the judgment. *Hansen v. Kinney*,

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46 Neb., 207; *Farris v. State*, 46 Neb., 857. In the case now before us the proceedings upon which the confirmation is based appear to support the order made. We therefore recommend that the judgment be affirmed.

HASTINGS, C., concurs. KIRKPATRICK, C., not sitting.

AFFIRMED.

THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,  
APPELLEE, v. NEHEMIAH L. D. SMITH ET AL, AP-  
PELLANTS.

FILED MARCH 5, 1902. No. 11,304.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: "PROCEEDINGS AT LAW": EVIDENCE. Evidence examined, and held insufficient to sustain a finding that no proceedings at law had been had for the recovery of the mortgage debt.

APPEAL from the district court for Webster county.  
Tried below before BEALL, J. *Reversed.*

*Overman & Blackledge*, for appellants.

*F. I. Foss, Bernard McNeny, B. V. Kohout and R. D. Brown, contra.*

ALBERT, C.

This is an appeal from a decree foreclosing a real estate mortgage. The petition contains the usual allegations "that no proceedings at law have been had for the recovery of the mortgage debt or any part thereof." This allegation was put in issue by the answers. The only evidence in support of such allegation is that given by two witnesses, whose examination on this point is as follows:

(D. B. Spanogle.) Q. You have been their [plaintiffs'] agent for several years?

A. Yes, sir. I have been attending to some of their property and making sales and loans for them.

Q. You don't know of any suit having been brought on this debt?

A. No, sir.

(Bernard McNeny.) I will state that for the last four or five years I have been attorney for the Massachusetts Mutual Life Insurance Company and foreclosed the original Smith mortgage, and since then had sold the land to Smith and taken this mortgage. Mr. Foss, of Crete, has been their attorney for the last year or two, and, so far as I know, there has been no proceedings had to collect this mortgage, other than this suit.

(Cross-examination.)

Q. When did you first receive these notes and this mortgage which have been introduced in evidence?

A. Day before yesterday, I think.

Q. Is that the first time you have ever seen them?

A. I think so.

Q. They have never been in your possession before?

A. No, sir.

Q. Do you know in whose possession they have been from the time of their execution until day before yesterday?

A. No, sir.

Q. Do you know where they have been?

A. No, sir.

It is urged, and we think justly, that the foregoing evidence is not sufficient to sustain the allegation that no proceedings at law had been had for the recovery of the mortgage debt, or any part thereof. The paper was never in the possession of either of the witnesses. It does not appear that either of them ever had anything to do with it that would render it any more likely that they should know whether such proceedings had been had than thousands of other persons. It will hardly be claimed, we think, that such evidence would be sufficient to sustain a finding going more directly to the merits of the case. This court has repeatedly held that such allegation is essential, and that, if denied, it must be proved. That being true,

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when called upon to weigh the evidence offered in support of it, we are not permitted to ignore nor relax the plain rules of evidence, simply because the defense may appear technical. Other questions are discussed, but they are not likely to arise on another trial of the case.

It is recommended that the decree of the district court be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

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EMMA C. MERRILL V. ELIZABETH MILLER ET AL.

FILED MARCH 5, 1902. No. 11,317.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: DEFICIENCY: EFFECT OF REPEAL OF STATUTE.**  
The act of 1897, repealing sections 847 and 849 of the Code of Civil Procedure, commonly known as the deficiency judgment law, does not affect the plaintiff's right to have a deficiency judgment entered in a foreclosure suit, on a cause of action accruing prior to, and existing at the time of, such repeal.
2. **Mortgage Foreclosure: DEFICIENCY: REPEAL OF STATUTE: COURT MAY AUTHORIZE ACTION AT LAW.** Such repeal does not deprive the court of the right to authorize the prosecution of an action at law, on the note, to recover a judgment for a deficiency, after foreclosure proceedings, where the right of action had accrued and existed at the time the repealing act took effect.

ERROR from the district court for Fillmore county.  
Tried below before HASTINGS, J. *Reversed with directions.*

*F. B. Donisthorpe*, for plaintiff in error.

*Chas. H. and Frank W. Sloan*, *contra*.

BARNES, C.

An action to foreclose a mortgage was commenced in the district court for Fillmore county after the law of

1897, repealing the sections of the statute relating to deficiency judgments in foreclosure proceedings, went into effect. A decree of foreclosure was rendered in the action on the 14th day of March, 1899, and at the expiration of the stay an order of sale was issued, the mortgaged property was sold thereunder and the proceeds of the sale were applied to the satisfaction of the decree, leaving a deficiency of \$287.88. After the confirmation of the sale, and the close of the chancery proceedings, the plaintiff filed a motion asking for a deficiency judgment, which motion was overruled, such judgment was denied and exceptions taken thereto. Thereupon the plaintiff filed a motion asking the court for an order authorizing him to bring a suit at law to recover a judgment on the note for the amount of the deficiency. This motion was overruled and the request denied. Exceptions were taken and plaintiff brings the case to this court on a proceeding in error.

It is sought by this proceeding to test the validity or constitutionality of the act of 1897 repealing the deficiency judgment law. An examination of the record discloses that this question is not properly before the court and should not be decided in this proceeding.

1. The motion for a deficiency judgment and the motion for leave to bring a suit at law are based on the decree, order of sale and the return thereto. The decree shows upon its face that the mortgage foreclosed, in the action, was executed on the 13th day of October, 1891, and became due and payable on the 1st day of October, 1896; that from and thereafter the amount due thereon remained due and wholly unpaid up to and including the time of commencing the suit and the rendition of the decree. The fact was, therefore, properly before the court that the cause of action had fully accrued and was in existence at the time the act of 1897 went into effect, although suit had not been commenced thereon. It is plain, under sections 847 and 849 of the Code of Civil Procedure, that prior to their repeal it was proper in a

foreclosure case on the coming in of the report of sale to enter a decree or judgment against the mortgagor, and other persons liable for the payment of the mortgage debt. *Thompson v. West*, 59 Neb., 677; *Davenport Plow Co. v. Meris*, 10 Neb., 317; *Clapp v. Maxwell*, 13 Neb., 542; *Cooper v. Foss*, 15 Neb., 515; *Grand Island Savings & Loan Association v. Moore*, 40 Neb., 686; *Hare v. Murphy*, 45 Neb., 809; *Flenham v. Steward*, 45 Neb., 640. Therefore, without the repeal of these sections, as provided for by the law of 1897, the plaintiff would have been entitled, upon his motion, to a deficiency judgment. In case he had waived such right and applied to the court for permission to bring a suit at law upon the note to recover the deficiency, it would have been proper and was the universal rule of the courts to have granted him his request and authorized the bringing of such suit at law. And in case either remedy, properly applied for, was refused by the court, it would have been such error as would call for a reversal of the judgment.

2. It only remains for us to determine the effect of the act of 1897 repealing sections 847 and 849 of the Code, commonly known as the deficiency judgment law. If the repeal of this law took away or changed the plaintiff's remedy in this foreclosure suit, then the judgment of the court was right and must be affirmed; but if the repeal of this law in no way affected the rights or remedies to which the plaintiff would be entitled in an action pending at the time of its passage, or on a cause of action already accrued, but not in suit at that time, then the judgment of the court was erroneous and should be reversed. Section 2, chapter 88, of the Compiled Statutes, declares that "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit." In *Thompson v. West*, 59 Neb., 677, 684, this court held that it was clear, as to suits pending at the time of such repeal, the right to a deficiency judgment was not abolished. It seems to us equally clear that such right was not abolished in any case

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where the cause of action had accrued, even if suit had not been commenced, prior to the taking effect of such repeal. In this case section 848 as amended by the act of 1897 can not be invoked to defeat the recovery of a deficiency judgment.

We hold therefore that the court erred in refusing the relief asked for in this case and the judgment should be reversed and the cause remanded with leave to the plaintiff to apply for a deficiency judgment.

OLDHAM and POUND, CC., concur.

Reversed and remanded with leave to the plaintiff to apply for a deficiency judgment.

REVERSED AND REMANDED.

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CONCORDIA LOAN & TRUST COMPANY, APPELLEE, v. CHARLES L. VAN CAMP ET AL., APPELLANTS.

FILED MARCH 19, 1902. No. 9953.

Commissioner's opinion. Department No. 1.

1. **Taxation: FORECLOSURE OF LIEN: CERTIFICATE AND RECEIPTS AS EVIDENCE.** In an action of foreclosure upon a tax-sale certificate, and for subsequent taxes and special assessments paid, such certificate and receipts signed by the proper officer are *prima facie* evidence of the validity of the taxes represented by them. *Ure v. Reichenberg*, 63 Neb., 899, followed.
2. **Taxation: FORECLOSURE OF LIEN: DESCRIPTION: ADMISSION: STATUTES.** Property sold for delinquent taxes was described in the tax-sale certificate as "balance of tax lot 31, section 34, township 15, range 13," and was described in the same terms on the tax lists and county records. In their answer to the petition praying a foreclosure of the tax lien defendants admitted the ownership by one of the defendants of the property described and their interest therein as alleged. *Held*, That under the provisions of section 142, article 1, chapter 77, Compiled Statutes 1901, the description was sufficient.

APPEAL from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed*.



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*Hall & McCulloch*, for appellants.

*H. W. Pennock and A. B. Coffroth*, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Douglas county by appellee, The Concordia Loan & Trust Company, against Charles L. Van Camp, and others, to foreclose certain tax sale certificates issued by the county treasurer of Douglas county. The petition alleged four separate causes of action, and as to each alleged that a sale was duly made by the county treasurer, that the property was subject to taxation, and that the sale was made for all taxes due at that time. The defendants answered the four causes of action. The answer is substantially identical as to each of the four causes of action, the answer to the first being as follows: "Come now the above named defendants [naming them], and answering the petition filed herein, for answer to the first paragraph thereof say: That the taxes therein set forth were irregularly and improperly assessed and levied against said land, and that said sale was irregular and invalid, for that it included only the pretended city taxes for the year 1891." The answer also contained the paragraph as follows: "Each and every allegation of said petition not hereinbefore specifically admitted defendants deny." To this answer a reply was filed, consisting of a general denial. Trial was had, which resulted in a finding and judgment in favor of appellee, from which judgment the cause is brought to this court by appellants on appeal.

Counsel for appellants contend that the decree entered by the trial court is erroneous and should be reversed for two reasons: first, that appellee did not prove the regularity of the proceedings including the levy and assessment leading up to the sale; second, that the description of the premises in the certificate set out in the third cause of action mentioned in the petition was void for uncertainty.

The determination of the first question presented must



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depend upon the effect to be given to the answer filed by appellants. A careful examination of this answer has satisfied us that it amounts to an admission of the levy of the taxes and of the sale as alleged in the petition, and to an allegation that such levy and sale were irregular. By section 148, chapter 12a, Compiled Statutes, 1901, governing cities of the metropolitan class, it is provided that irregularities in making assessments or in their equalization, or in the manner of the advertisement and sale of property for delinquent taxes and special assessments, shall in no way be held to invalidate such sale. Any irregularity in the sale of such a nature as to make it void must have been pointed out by the defendants. This they failed to do. But even if the answer filed by defendants was not an admission of the allegations of plaintiff's petition, the defendants would still not be in a position to complain. It appears from the bill of exceptions that the certificate and receipts for taxes prior and subsequent, representing the money paid out by appellees, were offered and received in evidence. These were sufficient to establish a *prima facie* case on behalf of appellee.

In the case of *Ure v. Reichenberg*, 63 Neb., 899, decided at this term, this court, speaking by SEDGWICK, J., said: "In an action of foreclosure upon a tax sale certificate, and for prior and subsequent taxes and special assessments paid by the holder of the certificate, the certificate and receipts of the proper officer for prior and subsequent taxes and special assessments are *prima facie* evidence of the validity of the taxes which they represent." It follows from this that the first contention of appellants is without merit and cannot be sustained.

It is next contended that the description of the premises in the certificate alleged in the third cause of action is totally insufficient to support a valid levy of taxes. The description mentioned is as follows: "Balance of tax lot 31, in section 34, township 15, range 13." Tax lot 31, as entered upon the records of Douglas county by the tax-

ing officers for revenue purposes, is an irregular tract containing 57.30 acres. From this irregular tract certain portions were from time to time sold by the owner, and passed into the hands of other parties. As these portions of the tract were sold, they were described upon the records as sub-tax lots, until, in 1891, there remained undisposed of, the title to which still remained in appellants, 27.04 acres, which were described on the tax lists as "balance of lot 31," giving the section, town, and range in which the land was located, together with the number of acres remaining in it.

Many authorities are cited in briefs of counsel for both parties touching the sufficiency of descriptions contained in deeds and other instruments and as to what in law are deemed latent and patent defects. But we do not deem it necessary to examine or discuss at length these authorities, as it is not required in the determination of the question here presented. By section 142, chapter 77, article 1, Compiled Statutes, 1901, concerning revenue, it is provided that "any defect in the description upon any assessment book, tax collector's book, or other record, of any real or personal property assessed for taxation, or upon which any tax is levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the county treasurer, tax collector, or other officer, or any person interested, to determine what property is meant or intended by the description" shall be deemed merely irregularities, not in any way invalidating the assessment. There can be no doubt that under this provision, the description of this property as "balance of tax lot 31," giving section, town, and range, was sufficient to apprise the owners, or any taxing officer, of the exact property remaining to be taxed, and was, therefore, sufficient. The petition filed by appellee described the property in the same terms which appear in the certificates and assessment records, and defendants, in their answer, say: "Defendants admit that Charles L. Van Camp is the owner of the property described in said petition, and that

defendants' interests in said property are as alleged in said petition." In the face of the evidence in this case, and this admission in the answer, there can be no doubt that the owner and the taxing officers of both the city of Omaha and Douglas county knew exactly the property taxed and sold as set out in the petition. This being true, appellants were in no manner prejudiced by the finding and judgment of the trial court, which are right and in accordance with law. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

**AFFIRMED.**

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**CHARLES B. GREGORY V. JULIA A. LEAVITT.**

FILED MARCH 19, 1902. No. 10,544.

Commissioner's opinion. Department No. 3.

**Appeal and Error: ASSIGNING ERROR IN OVERRULING MOTION FOR NEW TRIAL.** A judgment will not be reversed for errors of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial.

**ERROR** from the district court for Lancaster county. Tried below before TUTTLE, J. *Affirmed.*

*F. H. Woods and L. E. Winslow, for plaintiff in error.*

*Halleck F. Rose, contra.*

**ALBERT, C.**

All the assignments of error, relied upon in this case, are predicated on the rulings of the court during the progress of the trial and are covered by the grounds urged in the motions for a new trial. The ruling of the court on that motion is not complained of in the petition in error. Such being the case, we must assume that the ruling on that motion was satisfactory to the plaintiff, and

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that, whether the rulings therein complained of were erroneous or not, there was good ground for overruling the motion. That being true, the errors assigned in that motion are not available in this court. See *Gandy v. Cummins*, 64 Neb., 312.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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ANDREW J. MCCONAUGHY, ASSIGNEE OF W. R. SMITH, v.  
C. J. FARNEY ET AL.

FILED MARCH 19, 1902. No. 10,762.

Commissioner's opinion. Department No. 3.

**Vendor and Purchaser: TRANSFER IN FRAUD OF CREDITORS: ACTION TO RECOVER PURCHASE PRICE.** An action can not be maintained by a vendor or his assignee to recover from his vendee the purchase price of property conveyed in fraud of creditors. If in such case the transferee participated in the fraud, the maxim, *in part delicto potior est conditio defendentis*, applies. If he did not, and the property has been taken from him, without his fault, by the defrauded creditors, there has been a breach of the warranty title accompanying the sale which will defeat a recovery.


ERROR from the district court for Hamilton county.  
Tried below before BATES, J. *Reversed with instructions.*

*Hainer & Smith*, for plaintiff in error.

*Stark & Grosvenor*, contra.

AMES, C.

William R. Smith resided and was in business as a retail merchant at Aurora, in this state, and was insolvent. He conveyed his stock of merchandise to the defendants in error in this action, Glover and Farney, and received in part consideration therefor the promissory notes of the latter. Shortly thereafter he made a



general assignment, under the statute, for the benefit of creditors and turned over the notes to his assignee, the plaintiff in error. Certain of his creditors, by means of attachments, judgments and garnishments and a suit in the nature of a creditors' bill, obtained a decree in the district court for Hamilton county, afterwards affirmed in this court, setting aside the conveyance as to them as being in fraud of creditors, and compelling the vendees to account to them for the value and proceeds of the property conveyed. Meantime the assignee, the plaintiff in error, begun this action against Glover and Farney on the notes. The defendants herein for answer pleaded that the sole consideration for the notes in suit was the sale to them of the stock of goods and that said consideration had failed, or would fail if the above mentioned judgment should be affirmed on appeal, an appeal therefrom then being about to be prosecuted. But the defendants denied any complicity in or knowledge of the fraud of their vendor, if any such he had committed. To this answer the plaintiff, after interposing a general demurrer which was overruled, replied, admitting substantially its allegations, but saying, "which sale, transfer, delivery and conveyance this plaintiff affirms and ratifies and expressly elects to stand thereon and tenders no issue as to the good or bad faith of said sale and transfer." Upon the issues thus formed the cause came on for trial before the court and a jury, whereupon it was "agreed by counsel on the part of the plaintiff and the counsel on the part of the defendants that there was no question of fact in this case that required a trial by jury, and after argument of the law on the part of the plaintiff's counsel and on the part of the defendants' counsel, then the court should either, according to its opinion of the law, direct a verdict for the plaintiff or the defendants on the pleadings." Pursuant to the authority of this stipulation the court instructed a verdict for the plaintiff which was accordingly returned. Upon motion this verdict was afterwards set aside and a new trial granted and still later, but at the same term of

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court, still, in view of the stipulation, the court rendered upon the pleadings a judgment of dismissal and for costs, from which a petition in error is prosecuted to this court. The defendants in error seek to uphold the judgment by the argument that, inasmuch as the assignee is not a holder for value of the notes sued upon, but stands in the shoes of the payee, the maxim, *in pari delicto potior est conditio defendentis*, applies, and should have defeated a recovery. As to the general efficacy of the rule which the plaintiff invokes we have no doubt. When two parties are equally concerned in a transaction forbidden by law, or fraudulently concocted for the injury of the public or innocent third persons, the court will not lend its aid for the enforcement of any alleged obligation between the parties growing out of it, but this arises out of no consideration for the protection of, or of benefit to, the defendant. As is said in *Solinger v. Earle*, 82 N. Y., 393, in a similar case: "Fair dealing, and common honesty, condemn such a transaction. If the defendants here were plaintiff seeking to enforce the note, it is clear that they could not recover. *Cockshott v. Bennett*, 2 Term Rep. [Eng.], 763; *Leicester v. Rose*, 4 East [Eng.], 372. The illegality of the consideration upon well settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it. *Nellis v. Clark*, 4 Hill [N. Y.], at page 429." *Inhabitants of Worcester v. Eaton*, 11 Mass., 368; *Randall v. Howard*, 67 U. S., 585; *Marlatt*

McConaughy v. Farney.

*v. Warwick*, 19 N. J. Eq., 339. But inasmuch as the defense is one which is available to the defendant solely from considerations of policy, and not because of any merit that can be imputed to him, he should be held to the uttermost strictness of pleading and proof in seeking its protection. It is certainly a defense not more difficult of waiver than one which is meritorious.

Applying these principles to the matter in hand the case stands thus: The consideration of the notes in suit, to wit, the sale and delivery of the merchandise, is admitted. That the sale was fraudulent on the part of their vendor, Smith, is also inferentially admitted, but the defendants denied that they were participants in the fraud, and this denial the plaintiff did not see fit to controvert. The fact that the court, in another suit to which neither Smith nor his assignee was a party, had refuted this denial could not be pleaded as an estoppel in this action or in any way affect the rights of the parties hereto as between themselves. Two courses were open to the defendants, one to plead the fraud of Smith and their own participation therein, which, if established by the evidence, would have been a complete defense; the other to have pleaded that, although they were innocent of any wrongful act or knowledge on their part, yet Smith had been guilty of such fraud, negligence and wrong-doing that, without any fault of their own, they had lost the property, which was the consideration of the notes sued upon. In other words, that he had fraudulently or negligently committed a breach of the warranty of title which accompanied the sale of the goods. Neither of these issues was clearly or distinctly tendered, and for that reason we think the plaintiff in error was entitled upon the pleadings to a judgment in his favor.

It is recommended that the judgment of the district court be reversed and a new trial granted, with leave to both parties to amend their pleadings if they shall be advised so to do.

ALBERT and DUFFIE, CC., concur.

Starr v. Voss.

The judgment of the district court is reversed and a new trial granted with leave to both parties to amend their pleadings if they shall be advised so to do.

REVERSED WITH DIRECTIONS.

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CLARENCE A. STARR, APPELLANT, V. WILLIAM VOSS ET AL.,  
APPELLEES.

FILED MARCH 19, 1902. No. 10,874.

Commissioner's opinion. Department No. 1.

1. **Taxation: FORECLOSURE OF LIEN: CERTIFICATE AND RECEIPTS AS EVIDENCE.** In an action of foreclosure upon a tax-sale certificate, and for subsequent taxes and special assessments paid, such certificate and receipts signed by the proper officers are *prima facie* evidence of the validity of the taxes represented by them. *Ure v. Reichenberg*, 63 Neb., 899, followed.
2. **Taxation: FORECLOSURE OF LIEN: PLEADING: CONSTRUCTION.** Pleadings construed, and *held* to entitle plaintiff to a judgment.

APPEAL from the district court for Douglas county.  
Tried below before SCOTT, J. *Reversed.*

*James H. Adams* and *H. W. Pennock*, for appellant.

*Guy R. C. Read*, *contra.*

KIRKPATRICK, C.

This is a suit brought in the district court for Douglas county by Clarence A. Starr, plaintiff and appellant, against William Voss and others to foreclose a tax-sale certificate issued by the county treasurer of Douglas county. The petition sets out the purchase at private tax sale on June 9, 1892, of the property described in the petition, and alleges the issuance and delivery of the certificate of tax sale, of which a copy is set out, and that appellant, in order to protect his lien, paid various county, city and special taxes for the years from 1891 up to and including



1895, setting out the amounts. The defendant, Emma Waller, answered, pleading that she was the sole owner of the property mentioned, and further pleading said: "This defendant admits that the plaintiff purchased said premises on the 9th day of June, 1892, from the county treasurer of Douglas county at a pretended private tax sale for the year 1890." The defendant, by way of further answer, regarding subsequent payments, said: "This defendant has no knowledge or information concerning whether or not the plaintiff paid the said several sums of taxes as set out in the petition, and this defendant therefore denies that the plaintiff paid said taxes or any part thereof." Defendant then pleads that the assessment and levy of taxes for which the sale was made, and the taxes subsequently paid, are void for many reasons, among which are that the levy made by the county authorities exceeded the fifteen mills authorized by the constitution; that the plaintiff made the purchase about the first of June, and by conspiracy and connivance with the county treasurer, was permitted to retain his money, and did not pay it into the treasurer's office until the 2d day of August, following; that the special taxes were invalid because the city council failed to sit one day as a board of equalization. To this answer a reply was filed by appellant, consisting of a general denial. Trial was had to the district court, resulting in a judgment of dismissal of appellant's petition. During the progress of the trial a stipulation was entered into as follows: "It is stipulated by and between the plaintiff and defendant that the regular county taxes for the years 1893 and 1894 were duly assessed and levied upon the property described in the petition; also stipulating and agreeing that the regular city taxes of the city of Omaha were duly assessed and levied upon said real estate for the years 1891, 1892, 1893, and 1894." Upon the trial appellant offered in evidence his certificate of purchase and his receipts showing subsequent taxes paid, the records of the county commissioners showing the sitting of the board of equalization,

the records of the city showing the sitting of the council as a board of equalization, and the assessment rolls of the county and city showing the levy of the taxes. To all of this evidence objection was made by defendant, and the objection sustained by the trial court. While this proffered evidence is contained in the bill of exceptions, under the well established rule in this state it can not be considered on appeal. Some evidence offered was received by the trial court, but is not sufficiently material to require consideration in this case.

It is contended on behalf of appellant that the judgment of the trial court in dismissing the action was erroneous for the reason that appellant was entitled to a judgment of foreclosure upon his petition. The correctness of this contention is denied by appellee, who insists that all of the evidence having been excluded, the judgment of the trial court should be affirmed. Under the rule adopted in this court as announced in the case of *Ure v. Reichenberg*, 63 Neb., 899, that "in an action of foreclosure upon a tax-sale certificate, and for prior and subsequent taxes and special assessments paid by the holder of the certificate, the certificate and receipts of the proper officer for prior and subsequent taxes and special assessments are *prima facie* evidence of the validity of the taxes which they represent,"—a rule which may be regarded as settled,—an admission by appellee of the sale as set out in appellant's petition carries with it the presumption that the taxes were regularly levied, and that the sale is valid, throwing the burden of proof upon appellee to establish the invalidity of the taxes for which the property was sold and those which were subsequently paid, for the reasons set out in her answer. There is no doubt that upon the pleadings appellant was entitled to a decree of foreclosure for some amount and that the judgment of the trial court, dismissing appellant's petition, is erroneous, and should be reversed. Inasmuch as there seem to be very serious questions as to the validity of some of the subsequent taxes paid by appellant, it is deemed

in the interest of justice that this cause be remanded for a new trial. It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

HASTINGS and DAY, CC., concur.

REVERSED AND REMANDED.

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THE COMMERCIAL STATE BANK OF GENOA, NEBRASKA, v. S.  
R. ROWLEY.

FILED MARCH 19, 1902. No. 11,035.

Commissioner's opinion. Department No. 2.

1. Banks and Banking: TITLE OF INDORSEE TO CHECK: INDORSEE AS PARTY PLAINTIFF. The indorsee of a check is possessed of the legal title thereto, and is the proper party plaintiff in an action for its collection.
2. Appearance of Party as Witness. An appearance of a party to testify as a witness is not an appearance to the action.
3. Garnishment: ERRONEOUS JUDGMENT AGAINST GARNISHEE: LIABILITY TO INDORSEE: APPEAL. A garnishee should appeal from an erroneous judgment against him as acceptor of a draft or order rendered in a proceeding against the drawer, since he would remain liable to an indorsee, if he pays such judgment.

ERROR from the district court for Nance county. Tried below before ALBERT, J. *Affirmed.*

*M. V. Moudy and W. L. Rose, for plaintiff in error.*

*Albert Thompson and W. F. Critchfield, contra.*

OLDHAM, C.

On the 11th day of March, 1896, the firm of Greek & Wilbur, a copartnership, engaged in business in Genoa, Nance county, Nebraska, delivered to George White, "who then resided at Genoa," the following check on the Commercial State Bank of Genoa:

Commercial State Bank of Genoa v. Rowley.

"No. 880. GENOA, NEBRASKA, March 11, 1896.

"Commercial State Bank,


"Successor to Bank of Genoa,

"Pay to the order of Geo. White four hundred twenty-five dollars for bal. on 71 cattle.

"\$425. Due May 1, 1896.

GREEK & WILBUR."

After the receipt of this check George White removed to the county of Nodaway, in the state of Missouri, and, as the evidence shows, made a purchase of lands in Missouri for his wife, and in part payment of the purchase price of the land indorsed this check to S. R. Rowley, the plaintiff in the court below. This check was indorsed to Rowley before maturity and by Rowley was indorsed to the First National Bank of Maryville, Mo., and was transmitted for collection by the First National Bank of Maryville to the defendant, the Commercial State Bank of Genoa, on the 20th day of April, 1896, and ten days before its maturity. This check was paid by the makers at the Commercial State Bank of Genoa at the time of its maturity on the 1st day of May, 1896. On the day that this check matured and was paid the Commercial State Bank of Genoa was summoned as garnishee in a proceeding in garnishment in aid of execution on a judgment rendered by a justice of the peace of Nance county in favor of George M. Baer and against George White for \$200 and costs; and subsequently on the 30th day of May, 1896, the defendant bank was again summoned as garnishee in an attachment proceeding instituted by Henry Seyfer and against George White for \$199 alleged to be due on two promissory notes. The defendant bank answered as garnishee in each of these proceedings and in its answer set up the facts with reference to the check. Notwithstanding this answer the justice of the peace entered judgment against the bank as garnishee in each of the cases. These two judgments aggregated the full amount of the check in suit. Because of these garnishment proceedings the defendant bank refused to remit the proceeds of the check to the First National Bank of Maryville, and subsequently



paid the proceeds of the check into the justice's court in discharge of the two judgments rendered against it as garnishee. The First National Bank of Maryville charged the check back to the account of plaintiff, Rowley, at that bank and Rowley hereupon instituted suit on this check against the Commercial State Bank of Genoa in the county court of Nance county. An appeal was taken from the judgment of the county court to the district court of Nance county, where the issues above set forth were properly pleaded and a jury waived and trial had to the court. Judgment was rendered for the plaintiff and defendant brings error to this court.

The first contention of counsel for the defendant bank to which our attention is directed is that the evidence in the case tended to show that plaintiff, Rowley, had acted as agent for one Busby in the sale of the lands to White and that he took the check, indorsed to him by White, as agent, and consequently that Busby and not Rowley is the real party in interest in this suit. While it is true that plaintiff, Rowley, admitted that he was acting as agent for Busby in the sale of the land to White, it is also true that he testified that he accepted this check, as indorsee, as so much of a cash payment on the land and accounted to Busby for it as so much cash. Aside from this there is no merit in this contention, as Rowley, in any event, was the owner of the legal title to the check as indorsee and was the proper party to prosecute an action on it.

It is next contended by counsel for the defendant bank that plaintiff, Rowley, was a party to the garnishment proceedings in the justice's court and is therefore bound by the judgments in those cases, however erroneous they may have been. This claim is based on the fact that shortly after these proceedings were instituted plaintiff, Rowley, came to Genoa to see about the collection of his check and the president of the defendant bank told him of the garnishment proceedings and asked him to give a deposition to be used in these cases. This deposition ap-

pears to have been given and afterwards treated as evidence in these trials. It is on this fact alone that the defendant bank bases its claim that plaintiff, Rowley, was a party to, and had his rights adjudicated in these suits. It is no doubt true that where a party has been sued as a defendant and not served with proper process, but nevertheless participates in the trial of the cause and offers evidence in his own behalf, he thereby submits himself to the jurisdiction of the court and by his conduct waives a service of process; but while this is true, it is equally true that one who is not a party to a cause of action and merely appears for the purpose of testifying either in person or by deposition does not, by such act, constitute himself a party to the action. *Nixon v. Downey*, 42 Ia., 78; *Scott v. Hull*, 14 Ind., 136. It then follows that the rights of plaintiff, Rowley, are in nowise affected by these garnishment proceedings, unless the payment of the judgments rendered in these proceedings is sufficient to exonerate the defendant bank from a further payment of this check.

In determining this question we must meet it as it is presented to us in the record. The record shows indisputably that this was a negotiable check indorsed before maturity for a valuable consideration and that the defendant bank had full notice of this indorsement before it was summoned as garnishee in either of these proceedings. There is no question of a fraudulent assignment involved here. The early case of *Clough v. Buck*, 6 Neb., at page 348, quotes with approval the doctrine announced in *Gregory v. Higgins*, 10 Cal., 340, which says: "From the very nature of a promissory note, it is evident that, before its maturity, the indebtedness of the maker thereon cannot be the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. From its negotiability, it may often pass into the possession of parties entire strangers to the maker, and even if held by the defendant at the time of garnishment, it does not follow that it would be in his hands at its maturity, and, if transferred before maturity to a bona

*fide* holder it could be enforced, even if paid upon the attachment." It seems clear from this authority that the defendant bank was not liable as garnishee in the cases in which it was summoned, and however conclusive the judgment of the justice's court may now be between the parties before it, it was rendered without adjudicating the rights of the indorsee of the check, and hence is no protection to the garnishee in this action. As this judgment against the garnishee would not protect it against an action by the indorsee of this check it was its duty to appeal from the erroneous judgment of the justice of the peace instead of paying its money into court. *Montague v. Myers*, 11 Heisk. [Tenn.], 339; *Waples, Attachment and Garnishment*, page 515; 2 *Wade, Attachment*, sections 458 and 481.

We therefore conclude that the judgment of the learned trial court should be affirmed, and so recommend.

BARNES and POUND, CC., concur.

AFFIRMED.

# WASHINGTON COUNTY V. W. E. DAVID ET AL.

FILED MARCH 19, 1902. No. 11,062.

Commissioner's opinion. Department No. 2.

1. **Counties: BONDS: LACK OF AUTHORITY TO ISSUE: ESTOPPEL AS SUPPLYING AUTHORITY.** Where bonds of a county are issued without any authority, the subsequent conduct of the officers of the county toward bonds so issued can not create an estoppel which will supply this want of original authority.
2. **Counties: ISSUANCE OF BONDS: LONG ACQUIESCENCE: CONSTRUCTION.** A grant of power to a county to issue bonds in aid of internal improvements, if seasonably challenged, should be strictly construed; but after a long acquiescence in the exercise of the power, and after the consideration has fully passed and bonds are issued under an apparent authority which have passed into the hands of purchasers for value, a more liberal rule of construction in favor of the existence of the power should be applied.

ERROR from the district court for Washington county.  
Tried below before BAKER, J. *Reversed with directions.*

*Herman Aye, County Attorney, for plaintiff in error.*

*F. S. Howell, contra.*

*B. T. White, J. B. Shecan, F. Dolezal and W. J. Court-right, amici curiæ.*

OLDHAM, C.

On the 9th day of June, 1868, an election was held in Washington county, Nebraska, to vote on a proposition to execute and deliver bonds of the said county to the Sioux City & Pacific Railroad Company in the sum of \$75,000, at seven per cent. interest, payable by an annual levy of one mill on the dollar of the taxable property of the county until the debt and interest should be paid. This proposition received a majority of the votes cast at such election. The election was held under the provisions of chapter 9 of the Revised Statutes of 1866. After the election the road was constructed; and, its construction completed, the road was put in operation in the year 1869. Before the completion of the road on February 15, 1869, an act was passed by the territorial legislature giving specific power to issue bonds to aid in the construction of any railroad. In January, 1870, the board of county commissioners of Washington county in regular session made a record finding that the railroad had been completed and that the railroad company was entitled to the bonds and directed the bonds to be issued and signed by two members of the board, naming them, and the clerk under the seal of the said county. The bonds were accordingly issued and delivered to the railroad company and sold by the company to various purchasers. From the time of the issuance and delivery of the bonds the authorities of the county of Washington treated these bonds as a valid and binding obligation and made an annual levy of one mill for their payment as provided for in the contract under which they were issued. The one mill levy being insufficient to pay the interest on the bonds the amount of the indebtedness kept on accumulating until in



1899 the entire indebtedness on these bonds aggregated about \$180,000. In May, 1899, the board of county commissioners of Washington county undertook to refund these bonds in the manner prescribed in sections 38 and 39 of chapter 9 of Compiled Statutes of 1899, by an issue of \$100,000 of refunding bonds bearing three and three-fourths per cent. interest, payable in twenty years, to be exchanged for these outstanding bonds. Notice of this proposed exchange of bonds was duly given and a time appointed for taxpayers to make their objections, as provided by section 39, *supra*. W. E. David and four other taxpayers filed objections to the refunding of these bonds. The substance of the objections was that the bonds had been issued without any authority and were not a legal obligation of the county. There was also a formal objection that the bonds had been signed by only two of the three county commissioners. The matter was thereupon certified to the district court for Washington county, as provided by section 39, *supra*, and a trial was had to one of the judges of this court. The objections were sustained and the bonds declared to have been issued without authority and illegal. The board of county commissioners of Washington county immediately served notice of their intention to appeal to this court, as provided by section 39, *supra*, and the cause is now here for final adjudication.

It is urged for our serious consideration by the county attorney of Washington county, who represents the commissioners in this appeal, that these bonds have been adjudged a legal and binding obligation of that county by the United States court of appeals in the recent case of *Washington County v. Williams*, 111 Fed. Rep., 801, and that unless a decision is rendered by this court which will authorize the refunding of these bonds under the favorable proposition now submitted, the taxpayers of the county will either be subject to a one mill levy on each dollar of their assessed valuation for an indefinite length of time or, if, as is more probable, the taxable wealth of the county keeps on increasing the one mill levy will compel

## Washington County v. David.

them to pay the entire amount of their indebtedness at the high rate of seven per cent. interest.

Looking for the authority to issue these bonds, we find all that then existed in section 19 of chapter 9 of the Territorial Laws of Nebraska in the revision of 1866, which is as follows: "The said commissioners shall have power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition, as provided in this section." Now, unless the issue of these bonds is authorized by a proper construction of this section of the territorial statute it is wholly wanting. If there was no authority in existence at the time the election for these bonds was held to vote aid to a railroad company, it would be very unsafe to say that because an act was passed, after the election was held and before the road was actually completed and the bonds issued, that did clearly confer a right to issue bonds of this nature, that this subsequent act would support the validity of an election held a year before it came into existence.

The question then arises as to what rule of construction we should apply to the territorial statute above quoted, which was in force at the time the election for these bonds was held. Should it be construed strictly and all doubts resolved against its power to issue these bonds; or, should a more liberal rule be applied, in view of the conduct of the county, through the action of its officers, in treating this obligation as binding for a long period of time? We have no doubt that if there was an entire want of power to issue these bonds, the subsequent conduct of the officers of the county toward the bonds so issued could not create an estoppel which would supply their want of original

authority. We are inclined to the view that a more liberal rule is indulged in resolving doubts as to the existence of power to issue bonds when the consideration for the bonds has been received by the municipality and the bonds, even though non-negotiable, have passed into the hands of purchasers for value and their validity is not seasonably questioned than would be indulged in if the question of the want of power is challenged before or even immediately after the issue of the bonds. This theory of construction is supported by a long line of decisions of the supreme court of the United States. *Atchison Board of Education v. De Kay*, 148 U. S., 591; *Mayer v. Dennison*, 69 Fed. Rep., 58; *Portsmouth Savings Bank v. City of Springfield*, 4 Fed. Rep., 276; *Supervisors v. Schenk*, 5 Wall. [U. S.], 772. And the same rule has been sanctioned by most of the courts of last resort of the several states. *Leavenworth, L. & C. R. Co. v. Commissioners*, 18 Kan., 170; *Society for Savings v. City of New London*, 29 Conn., 175; *State v. Van Horn*, 70 Ohio St., 330; *Barrett v. County Court of Schuyler County*, 44 Mo., 198. Our own court commends this rule in its decision in *Cook v. City of Beatrice*, 32 Neb., 80. If, then, we should apply a liberal rule of construction to the powers granted in the territorial statute above cited, and should resolve doubts in favor of instead of against the power because of the long acquiescence in and acknowledgment of the validity of these bonds by the officers of the county and because the consideration has fully passed for which the bonds were issued, we can, without a strained construction, say that the power conferred to submit the question "whether the county will aid or construct any road or bridge" can be construed to be broad enough to include aid to be voted to a railroad. Without entering into a discussion that would be more profitable to lexicographers than to courts as to the exact meaning and signification of the word "road" as used in this statute, it is sufficient to say that courts themselves have differed as to whether the word "road," in its generic use, is sufficient to include a railroad.

## Washington County v. David.

The supreme court of the state of Indiana in two cases, *The Evansville, I. & C. S. L. R. Co. v. The City of Evansville*, 15 Ind., 395; and *City of Aurora v. West*, 9 Ind., 74, held that the word "road" in its generic sense includes a railroad. To the same effect is the holding of the supreme court of the United States in *Van Hostrup v. Madison City*, 1 Wall. [U. S.], 291.

The supreme court of Iowa, in the case of *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Greene [Ia.], 4, held to the same effect; but this case was subsequently overruled in the case of *Stokes v. County of Scott*, 10 Ia., 166.

This then leaves the question in some doubt, and had the question of this authority been seasonably challenged before the bonds were issued it would certainly have been entitled to very serious consideration, but, as we view it, in harmony with the authorities cited we should now resolve this doubt in favor of the existence of the authority. As this was the only question presented for our consideration, and the only one relied upon by the objectors, it is recommended that the judgment of the district court be reversed, and that the cause be remanded with directions to the district court to enter a judgment declaring the amount owing upon such bonds as of the day that such finding of validity is made.

BARNES and POUND, CC., concur.

The judgment of the district court is reversed, and the cause remanded with directions to the district court to enter a judgment declaring the amount owing upon such bonds as of the day that such finding of validity is made.

REVERSED WITH DIRECTIONS.

JENNIE C. SMITH, APPELLEE, v. DARWIN B. SMITH, APPELLANT, ET AL.

FILED MARCH 19, 1902. No. 11,174.

Commissioner's opinion. Department No. 8.

1. **Mortgage Foreclosure: EVIDENCE.** Evidence examined, and *held* sufficient to sustain the findings of the trial court.
2. **Judgments: RES JUDICATA: APPLICATION.** The doctrine of *res judicata* applies only to final judgments, not to interlocutory judgments or orders, which the court may vacate or modify upon a further hearing.

APPEAL from the district court for Boone county.  
Tried below before THOMPSON, J. *Affirmed.*

*Baldrige & De Bord*, for appellant.

*J. A. Price*, contra.

ALBERT, C.

This action was brought by Jennie C. Smith against Darwin B. Smith and others to foreclose a mortgage, executed to her by the said Darwin B. Smith and his wife, on certain real estate in Boone county. The defendants made default, and a decree of foreclosure was entered as prayed. Within the statutory time the defendant, Darwin B. Smith, filed a request for stay. Thereafter he filed a petition in the district court, asking that the plaintiff be restrained from proceeding to a sale under her decree of foreclosure, that said decree be set aside, and that he be permitted to defend. Issue was joined in this second case, and trial was had which resulted in a decree whereby the decree in the foreclosure case was vacated, and leave granted the said defendant to appear in that case and make his defense. It was further provided in said decree that the two cases be consolidated, permitting the parties thereto to have an adjudication of such defenses as they might have. Afterward, in defense of the foreclosure

case, the said defendant pleaded, that the only consideration for the mortgage was the execution and delivery of a deed of conveyance, by the plaintiff to him, of an undivided one-half of the mortgaged premises; that her title thereto was based on a deed executed and delivered to her by her husband, now deceased, in his lifetime, who, at the time of such conveyance, was the owner of the same in fee simple; that plaintiff's deed to the defendant contained the usual covenants of warranty of title; that at the time of the conveyance, to the plaintiff by her husband, of the said premises, he was of unsound mind and lacked sufficient mental capacity to execute such conveyance; that, therefore, at the time of the conveyance by the plaintiff to the defendant, she had no title to the premises in question, and consequently there was a breach of her covenants of warranty. The mental capacity of plaintiff's grantor, at the time of the execution of his deed to her, appears to have been the only question of fact tried in the case. There was a finding and decree for the plaintiff, and the defendant, Darwin B. Smith, brings the case here on appeal.

It is strenuously urged that the evidence is wholly insufficient to sustain a finding that the plaintiff's grantor had mental capacity to execute the deed hereinbefore mentioned. To set out at length the evidence bearing upon this point would serve no useful purpose. We have examined it with some care. While we are satisfied, from a reading of the testimony, that the grantor was not of perfectly sound mind at the time, yet, whether he had sufficient mental capacity to understand, in a reasonable manner, the nature and effect of such conveyance, is a question upon which, from the evidence, reasonable minds might easily differ; consequently, it cannot be said that the finding of the court, upon this point, is not sustained by sufficient evidence.

It is insisted by the appellant, that, as in the action brought to restrain the plaintiff from proceeding under her first decree of foreclosure, the court found that her

grantor was insane at the time he executed the deed to her, the question of his insanity in the last trial was *res judicata*. But from the fact that that action was consolidated with the present one; that it was expressly provided in that decree that the first decree of foreclosure should be vacated and the defendant be let in to defend; and that the sole issue tried at the last hearing was the mental capacity of such grantor, shows conclusively that the decree, vacating the original decree of foreclosure, was interlocutory only and so intended by the trial court. It was not a final decree, for, from its very nature, the court reserved the issues therein involved for further consideration upon a fuller hearing, and, consequently, the power to vacate or modify such decree thereupon.

It is recommended that the decree of the district court be affirmed.

**AMES and DUFFIE, CC., concur.**

**AFFIRMED.**

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**EDWIN JEARY V. THE AMERICAN EXCHANGE BANK ET AL.**

**FILED MARCH 19, 1902. No. 11,211.**

**Commissioner's opinion. Department No. 3.**

- 1. Garnishment: AFFIDAVIT FOR SUMMONS: SUFFICIENCY.** An affidavit for a summons in garnishment examined, and held fatally defective.
- 2. Garnishment: AFFIDAVIT: RECITAL OF AGENCY.** The better practice requires the fact of agency in an affidavit for attachment or garnishment to be sworn to by the affiant and not set out by way of recital merely.

**ERROR** from the district court for Cass county. Tried below before **RAMSEY, J.** *Reversed.*

*Edwin Jeary, Jesse L. Root and Allen Beeson* for plaintiff in error.

*William Deles Dernier and H. D. Travis,* contra.

DUFFIE, C.

The principal question in this case is the sufficiency of an affidavit as a basis for garnishment proceedings after judgment. The affidavit is in the following form:

"AMERICAN EXCHANGE BANK, a Corporation, }  
v.  
L. W. MEYERS, first name unknown. }

"American Exchange Bank, by W. S. Waters, cashier, plaintiff in the above entitled action, being first duly sworn, deposes and says that on the 12th day of May, 1896, plaintiff recovered a judgment against L. W. Meyers, defendant, for the sum of \$66.54 and \$3.45 costs in an action pending before John Clements, a justice of the peace of Cass county, and that on the 5th day of June, 1896, an execution was duly issued on said judgment and delivered to Charles Rivett, constable of said county, and was by him on the 5th day of June, 1896, returned wholly unsatisfied, as no property was found upon which to levy. Affiant further states that he has good reason to, and does believe, that Edwin Jeary and M. D. Wells & Co. have property of, and are indebted and have property in their possession and under their control by virtue of a chattel mortgage of said L. W. Meyers.

W. S. WATERS, *Cashier.*

"Subscribed in my presence and sworn to before me this 5th day of June, 1896.

JOHN CLEMENTS,

*"Justice of the Peace."*

In our opinion the affidavit is fatally defective. It nowhere appears in the affidavit that Waters, cashier, made oath to the same. On its face it purports to be the affidavit of the American Exchange Bank and not of any individual. It is entirely clear that no indictment for perjury could be sustained against Waters for any false statement contained therein, and this, as we understand, is the principal test of the sufficiency of an affidavit of that character. We have been referred to the case of *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520, as authority



in support of the sufficiency of the affidavit in this case. An examination will show that there is no similarity. It distinctly appears from the affidavit in the case referred to that it was the affidavit of S. W. Croy, the agent of the plaintiff in the action. And such also was the case in *Whipple v. Hill*, 36 Neb., 720; *Rudolf v. McDonald*, 6 Neb., 163; *Tessier v. Englehart*, 18 Neb., 167, and *Jansen v. Mundt*, 20 Neb., 320. In all of these cases it distinctly appears that the same was sworn to by the party subscribing the same. Our statute, section 244, Code of Civil Procedure, requires the affidavit to be made by the judgment creditor, his agent or attorney. While the question has never been directly passed upon in this state, we believe the better practice is to require the fact of agency to be sworn to as other matters of fact, and not inserted in the affidavit as a mere recital. *Miller v. Adams*, 52 N. Y., 409, is cited as an authority to the effect that the agent or attorney making the affidavit need not swear to his authority. We think the case went no further than to hold that where the affidavit was made by an attorney who conducted the case, his authority would be presumed in that matter, as in other matters connected with his appearance. Where the whole record taken together discloses that the affiant is the plaintiff or agent or attorney of the plaintiff, it is undoubtedly sufficient; but in this case the record, outside of the affidavit, is silent as to Waters or his relations to the bank.

In *Tessier v. Englehart*, 18 Neb., 167, it is intimated that the affidavit must show, not by way of recital, but as one of the facts to be verified by the oath of the affiant, that he is either plaintiff or agent or attorney of the plaintiff. We do not, however, place our decision upon this ground, but upon the ground that the affidavit, or rather the want of an affidavit, was fatal to the jurisdiction of the justice. The garnishee might waive the invalidity of the affidavit and subject himself to the jurisdiction of the court, but he could not by an appearance give the court jurisdiction over any property of the defendant in the

garnishment proceedings or, by his appearance, confer upon the justice jurisdiction over effects or property of the defendant in his hands, jurisdiction of which the statutes provide must be acquired by affidavit setting out particular facts.

In *Steen v. Norton*, 45 Wis., 412, the court said: "In the special statutory proceedings of garnishment, attachment as *mesne* process, replevin, and the like, in justices' courts, the justice acquires jurisdiction of the proceeding only by compliance with the statutory conditions; and where there is no such compliance on plaintiff's part, a voluntary appearance by defendant, and submission of his person to the jurisdiction of the court, can not waive the defect." This court announced the same rule in *State v. Duncan*, 37 Neb., 631. The second paragraph of the syllabus of the opinion is as follows: "In order that proceedings in garnishment may be pleaded against third parties, it must affirmatively appear from the record that the steps were taken necessary to confer jurisdiction, and a voluntary appearance and answer by the garnishee does not supply the place of such jurisdictional proceedings."

We believe that on the merits the judgment of the district court was right, and we would, were it possible without violating what we believe to be fundamental, legal principles, affirm the judgment. A proceeding in garnishment by which the plaintiff in an action seeks to reach the rights and effects of the defendant by calling into court some third party who has such effects in his possession or who is indebted to the defendant is an extraordinary proceeding, and is maintainable only because the statute gives that right. The authorities all agree that before the right can be exercised, before the court can take jurisdiction and proceed in the matter, all steps prescribed by statute must be strictly observed. The reasoning of Judge RYAN in *Steen v. Norton*, *supra*, is irresistible and conclusive upon this question, and this court in *State v. Duncan*, *supra*, has announced its concurrence in his views. We think the question is not an open one, and following the rule hereto-

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fore announced by this court, we recommend that the judgment of the district court be reversed.

AMES and ALBERT, CC., concur.

REVERSED AND REMANDED.

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THE COUNTY OF GREELEY V. F. AND A. GEBHARDT.

FILED MARCH 19, 1902. No. 11,237.

Commissioner's opinion. Department No. 1.

1. **Counties: REVIEW OF CLAIM: NOTICE OF APPEAL: STATUTES.** Where a claim has been disallowed by the county commissioners and a notice of appeal given to the county clerk within the time limited by statute, an indorsement upon such notice as follows: "I hereby accept service of the within notice," is sufficient proof that the service of the notice has been made.
2. **Evidence: VALUE OF PROPERTY: QUALIFICATION OF WITNESSES.** Resident owners of farm property in the particular locality, who are acquainted with the land in question, are qualified to testify as to its value, although no recent sales have been made in the locality upon which to base the estimate of value.


ERROR from the district court for Greeley county. Tried below before KENDALL, J. *Affirmed.*

*J. R. Swain, for plaintiff in error.*

*Scott & Howard, contra.*

DAY, C.

The defendants in error filed a claim with the county commissioners of Greeley county for damages sustained by them by reason of the establishment of a public road along and through certain lands owned by the defendants in error. The damages claimed arise out of an appropriation for the purposes of the road of about four acres of land belonging to the defendants in error, and also by reason of having to move a fence along the north and west sides of said land. The board allowed the claim to the



amount of \$32, and disallowed the balance, from which decision the defendants in error appealed to the district court. In the district court a jury was waived and a trial had to the court, which found that there was due to the defendants in error from the plaintiff in error upon the account set forth in the petition the sum of \$90, and ordered that the cause be remanded to the county commissioners for payment. From this judgment the plaintiff in error has brought the case to this court by proceedings in error.

It is contended by the plaintiff in error that the court had no jurisdiction over the parties because no notice of appeal was ever served upon the county clerk as required by law. There is no dispute that the notice of appeal was given to the county clerk within the time limited by statute. The principal point, however, sought to be made is that the clerk was not served with the notice of appeal. The manner of taking an appeal from an order of the county board in this class of cases is regulated by section 39 of chapter 78 of the Compiled Statutes, which, in so far as it relates to the subject now under discussion, is as follows: "but notice of such appeal must be served on the county clerk within twenty days after the decision is made." A notice of appeal was made out and given to the county clerk, who wrote thereon the following indorsement: "I hereby accept service of the within notice. James Fox, County Clerk." The legal effect of this acceptance of service merely obviated the necessity of further proof that the notice of the appeal had been given to the clerk. The object of the notice of the appeal is to apprise the county as a body corporate that an appeal has been taken, so that it may through its proper officers prepare for trial. The notice of the appeal within the time limited by statute has been held to be indispensable to the right to exercise it. *Richardson County v. Miles*, 14 Neb., 311. The notice of the appeal could be served by a simple delivery of the notice to the county clerk, as was done in this case. The proof that it was

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served could be made by the return of the officer serving it or by the affidavit of the party making the service, if he were not an officer. We see no valid reason why the party upon whom the service is made may not furnish the proof of service by an acknowledgment or acceptance of the service.

It was also contended that it was error to permit certain witnesses, including one of the defendants in error, to testify as to the value of the land taken. The witnesses referred to were farmers living in the vicinity who knew the land in question and, in the case of the defendant in error, resided upon the land. They knew of no recent sales in that vicinity, in fact none had been made for several years, and for that reason it is urged they were not qualified to give testimony as to its value. It is a well recognized rule that to qualify a witness to give testimony concerning the value of land he must be shown to possess some knowledge upon the subject; it would seem, however, that the amount or scope of his knowledge would relate more to the weight and effect which should be accorded to his testimony, rather than to the right to give it.

In *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb., at page 31, this court, in discussing this question said: "It is sufficient that resident owners of land in a farming neighborhood have generally been held competent witnesses to the value of real estate in such community. In a leading case upon the subject, *Robertson v. Knapp*, 35 N. Y., 91, the witnesses, all of whom were residents of the immediate neighborhood, some being engaged in farming and others retired farmers, were held competent without further showing. In the opinion it is said: 'There are no certain data which, if given, will fix the value of land. The same data will produce widely different results as to the value, depending, perhaps, on location and the use to which it can be applied, or upon the demand. The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation.' The opinion of such a witness may not be the best or most

satisfactory evidence attainable, and yet it is difficult to conceive of persons better qualified to testify upon the subject of the value of farming lands than resident owners of like property in the particular locality. It is, to say the least, competent evidence, its weight or probative force to be determined by the jury and depending upon the facts of the particular case."

In our opinion the judgment of the lower court is amply sustained by the evidence, and we therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CO., concur.

AFFIRMED.

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JOSEPH G. SLOAN, SHERIFF OF PAWNEE COUNTY, NEBRASKA, v. REBECCA FIST.

FILED MARCH 19, 1902. No. 11,242.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: REPLEVIN: INSTRUCTIONS.** Instructions examined, and *held* properly given.
2. **Replevin: ADMISSION AND EXCLUSION OF EVIDENCE NO ERROR.** The action of the trial court in admitting and excluding testimony, approved.
3. **Replevin: FAILURE TO GIVE UNDERTAKING: MEASURE OF DAMAGES.** Where a plaintiff in replevin fails to give an undertaking and the action proceeds under section 193 of the Civil Code, the measure of plaintiff's damage is the value of the property taken, with seven per cent. interest from the time of the wrongful taking.
4. **Replevin: FAILURE TO GIVE UNDERTAKING: ALTERNATIVE JUDGMENT WITHOUT PREJUDICE.** In such an action the judgment should be for the amount of damages found due the plaintiff by the verdict of the jury and should not be for the return of the property; but where a judgment is entered in the alternative for the return of the property or the damages assessed, the defendant can not complain of such an irregularity in the form of the judgment, because it is without prejudice to him.

ERROR from the district court for Pawnee county.  
Tried below before STULL, J. *Affirmed.*

Sloan v. Fist.

*Story & Story*, for plaintiff in error.*Francis Martin and Lindsay & Raper*, contra.

OLDHAM, C.

This was a suit in replevin instituted by Rebecca Fist against the sheriff of Pawnee county, Nebraska, for a stock of goods held by the sheriff under attachment writs sued out against Herman Fist. The only question involved is as to the ownership of the goods. Plaintiff, Rebecca Fist, having failed to procure a bond for the delivery of the goods, the sheriff retained possession of the stock and the action proceeded as one for damages for the value of the goods taken. Plaintiff had judgment in the court below, and defendant sheriff brings error to this court.

A former judgment in favor of the plaintiff in this cause was reviewed on error in this court and the judgment reversed for errors committed by the trial court in the admission of testimony. See *Sloan v. Fist*, 53 Neb., 691, 74 N. W. Rep., 45. The facts connected with the alleged purchase of the stock of goods in dispute by plaintiff, Rebecca Fist, are fully set forth in the opinion by IRVINE, C., in this case at its former hearing and need not be again stated. The evidence introduced in support of the judgment which we are asked to again review is in all essentials the same as that introduced at the first trial of the cause, the only material additions being the testimony introduced necessary to cure the defect in the admission of the checks of Herman Fist with the indorsement thereon "Chg. R. Fist a-c."

A large portion of the brief filed in behalf of plaintiff in error is devoted to a discussion of the sufficiency of the evidence to sustain the verdict. A careful examination of the testimony offered in the trial below leads us to the conclusion that much competent testimony was introduced in behalf of Rebecca Fist strongly tending to show the absolute good faith of her purchase for a valuable consideration of the stock of goods in dispute. The court gave

ten instructions at the request of plaintiff in error on the question of the *bona fides* of this purchase. These instructions were drawn as favorably for the contention of plaintiff in error as it was possible for the learned and able counsel that represented him to construct them, and it seems to us as though they contained everything, presented in the most favorable manner, that the plaintiff in error was entitled to at the hands of the trial court.

Five instructions were given at the request of counsel for Rebecca Fist and objection is only made to one of these instructions in the brief of plaintiff in error. This was an instruction that treated of the rights of relatives to deal with each other. It is not contended that this instruction contained anything within itself that was inherently wrong, but it is merely suggested that it might have led the jury to believe that if Rebecca Fist had any interest in the goods either as owner or mortgagee, and had procured the same by a fair course of dealing with her brother-in-law, then she would be entitled to recover in this action. We do not think that the instruction could have led the jury to any such a conclusion as this, for it was and should have been construed in connection with all the other instructions given; and the other instructions told the jury that she claimed the goods as the owner of the stock by purchase from Herman Fist, and all the evidence introduced on her behalf tended to support this contention.

A large number of vague and uncertain allegations of error of the trial court in the admission of evidence are dimly outlined in the brief of plaintiff in error. Many of these allegations are so indefinite and uncertain in the manner presented that we are hardly justified in examining into them at all. But, nevertheless, we have investigated the record of the trial court in its holdings and are fully convinced that there is little of error and nothing of prejudice in its rulings on the admission and exclusion of evidence. The court gave the plaintiff in error the widest and most liberal range in his cross-examination of



the witnesses who testified in behalf of Rebecca Fist and in no manner obstructed their thorough and searching investigation of every fact and circumstance that in the remotest manner tended to discredit the good faith of her transactions with Herman Fist. Much evidence offered by plaintiff in error that was very remote in its bearing on the question at issue was admitted by the trial court and nothing was excluded except such as was plainly and clearly incompetent and immaterial.

It is urged by counsel for plaintiff in error that the judgment rendered by the trial court is excessive and is contrary to law. As set forth in the statement of this cause, Rebecca Fist, the plaintiff in the lower court, failed to give a replevin undertaking and the action proceeded as one for damages under section 193 of the Code of Civil Procedure. The court instructed the jury that if it found for plaintiff, the measure of her damages should be the value of the property at the time it was taken, with interest from the time of taking at the rate of seven per cent. This was clearly the correct rule by which her damage should be measured. Under this instruction the jury returned a verdict for plaintiff for the value of the property as shown by the evidence and seven per cent. interest from the time of taking. On this verdict the court entered an alternative judgment providing for either a return of the property or a judgment for the damages as returned by the verdict. So much of the judgment of the court as provided for a return of the property was plainly unwarranted by the law. The judgment should have responded to the verdict and have been for damages alone. *Philleo v. McDonald*, 27 Neb., 142, 42 N. W. Rep., 904. But we can not see how the plaintiff in error could be in any manner injured by this alternative judgment, as it only gave him an election to which he was not entitled in the manner in which he might satisfy the judgment. In the case of *Philleo v. McDonald*, *supra*, the complaint was made by the defendant in the lower court because the court refused to enter an alternative judgment in a case similar to this, and the court held,

and rightly too, that he was not entitled to have such judgment entered. While it is clear that the action of the court in rendering an alternative judgment in this case was erroneous, yet it is equally clear that its action was in nowise prejudicial to the plaintiff in error. Plaintiff in error simply got more than he deserved by this judgment and of this he should not complain.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CO., concur.

AFFIRMED.

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RALPH R. OSGOOD, APPELLEE, v. NELSON WESTOVER, APPELLANT, IMPLEADED WITH MARY CARMAN ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 11,260.

Commissioner's opinion. Department No. 2.

**Taxation: FORECLOSURE OF LIEN: LIMITATION OF ACTIONS.** When land has been sold for taxes and the suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself. *Alexander v. Shaffer*, 38 Neb., 812, followed.

APPEAL from the district court for Lancaster county.  
Tried below before FROST, J. *Affirmed.*

*E. H. Wooley*, for appellant.

*Wilson & Brown*, contra.

OLDHAM, C.

This is an appeal by a cross-petitioner from the judgment of the district court dismissing his cross-petition in a foreclosure proceeding in the court below. The cross-petition was filed for the purpose of foreclosing a tax lien based on four tax certificates alleged to have been pur-

chased by the cross-petitioner. These tax certificates were dated November 20, 1890. The petition in this case was not filed until November 3, 1898, and the cross-petition of appellant was not filed until January 4, 1899; hence the cross-petition shows on its face that more than five years had elapsed from the time a right of action accrued on these certificates before the filing of the suit in which this lien is sought to be enforced.

In the case of *Alexander v. Shaffer*, 38 Neb., 812, this court held that "When land has been sold for taxes and the suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself." It is therefore manifest that the judgment of the learned district court in dismissing this cross-petition was right and we recommend that it be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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MINERVA C. ROBERTS, APPELLEE, V. FRANK A. ROUSE, APPELLANT.

FILED MARCH 19, 1903. No. 11,276.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: OBJECTIONS TO APPRAISAL: WHEN MADE. Objections to the appraisement of real estate, sold under a decree of foreclosure, to be available, must be made before sale.

APPEAL from the district court for Custer county.  
Tried below before SULLIVAN, J. *Affirmed.*

*J. R. Dean*, for appellant.

*Alpha Morgan*, contra.

**ALBERT, C.**

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. The objections relied upon for a reversal of the order of confirmation are based solely on matters, other than fraud, pertaining to the appraisement of the premises sold, and were raised for the first time by a motion filed after the sale had been made, in which both defendants joined. That such objections, to be available, must be made before sale is too well settled to require a citation of authorities. Even had they been made before sale in this case they must have been overruled as to one of the defendants, at least. As both joined in the motion, it was properly overruled as to both.

It is recommended that the order of confirmation be affirmed.

**AMES and DUFFIE, CC., concur.**

**AFFIRMED.**

**HORATIO COLONY, APPELLEE, V. JOSEPH BILLINGSLEY ET AL., APPELLANTS.**

**FILED MARCH 19, 1902. No. 11,283.**

**Commissioner's opinion. Department No. 1.**

- 1. Mortgage Foreclosure: OBJECTION TO TIME OF HOLDING SALE: NO PREJUDICE.** Objection that sale was by standard time and no mention made of that fact in notice *held* to show no ground for setting aside sale where no prejudice appears and sale was held open one hour.
- 2. Mortgage Foreclosure: MISTAKE OF DATE OF DECREE IN ORDER OF SALE.** Objection that order of sale recited a wrong date of decree *held* immaterial.
- 3. Appeal and Error: SIGNING COMPLETE RECORD.** Requirements as to signing complete record are directory, and not essential to validity of court's action.

**APPEAL from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.***

*B. O. Hostetler*, for appellants.

*A. B. Coffroth*, *contra*.

HASTINGS, C.

This is an appeal from a decree of confirmation by the district court for Buffalo county. Objection was made to the confirmation on eleven grounds. Only three are urged in the brief, and none others will be considered. These are, 1st, that the sale was advertised for 2 o'clock P. M., and was held according to standard time instead of sun time; 2d, that the order of sale recites a decree of May 24, 1899, when in fact the decree was rendered on May 24, 1898; 3d, that the complete record of the decree had not been signed by the judge.

So far as the first objection is concerned, it appears from an affidavit that the sale was opened at 2 o'clock P. M. standard time, and closed at 3 o'clock standard time. The advertisement was for a sale at 2 o'clock P. M. On the authority of *Searles v. Averbhoff*, 28 Neb., 668, this advertisement is claimed to mean sun time and that the sale by standard time was irregular. No prejudice appears, and by the showing the sale was kept open a half hour after the advertised time. The other objections are not claimed to have caused any prejudice. The advertisement announced a sale under the decree. The order of sale was unnecessary and its misrecital of the date of the decree is not deemed important. The objection that the complete record had not been signed does not seem to require any consideration. The statute cited as to complete record and the time of making and signing are directory and are not made, nor were they intended to be, a prerequisite to the validity of the court's acts.

It is recommended that the action of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

CHARLES E. FOSTER V. BENJAMIN F. PITMAN.

FILED MARCH 19, 1902. No. 11,284.

Commissioner's opinion. Department No. 8.

**Usury.** INTEREST TAKEN IN ADVANCE. Interest or any part of the interest agreed upon for a loan of money may be taken in advance, and the transaction is not usurious provided the amount retained as advanced interest and the rate stipulated for in the note do not together exceed ten per cent. for the time the loan is to run. *Pierce, Wright & Co. v. Davey*, 43 Neb., 45.

ERROR from the district court for Dawes county. Tried below before HOLLENBECK, J. *Affirmed.*

*Allen G. Fisher*, for plaintiff in error.

*Albert W. Orites*, contra.

DUFFIN, C.

This is an action brought by the defendant in error against the plaintiff in error on a promissory note made August 15, 1889, and maturing June 1, 1894. The note is for \$450, payable to the Security Investment Company or order, and by that company indorsed to the defendant in error. The defendant below pleaded usury as a defense, and also that the plaintiff below was not the owner of the note, but had purchased the same as the agent of the defendant and held it in trust for him. The jury returned a verdict for the plaintiff below. A motion for a new trial was overruled and judgment entered on the verdict, from which Foster has taken error to this court. We may dispose of the claim that Pitman purchased the note for Foster with the observation that we find no evidence in the record to support such a defense, and we have carefully examined not only all that was allowed to go to the jury, but also all that was offered by Foster and refused by the court.

Sometime in 1899 the secretary of the Security Investment Company wrote Pitman that they held a note and

mortgage made by Foster in 1889, and that he desired to learn the present condition and value of the security. He also stated that they would prefer to sell the mortgage claim rather than to foreclose it. Some further correspondence was had and Pitman wrote the company February 20, 1899, that he thought he could make a trade so as to realize \$150 for the note and mortgage, and on February 24, 1899, the company sent Pitman the note and mortgage properly indorsed and March 31, 1899, Pitman remitted \$150 in payment. This action was commenced April 24, 1899, and this is absolutely all the evidence introduced or offered tending to show that Pitman purchased the mortgage for Foster or that the action was instituted prior to the transfer of the note and mortgage to Pitman. Upon the trial of the case the defendant requested the right to open and close, asserting that the burden of proof was on him to establish his defense. This was denied by the court and error is assigned thereon.

The answer of the defendant admitted the making of the note, but denied each and every other allegation of the petition. Before Pitman could recover the burden was on him to show that the note had been duly indorsed to him. Under the pleadings as they stood if no evidence had been introduced, judgment would have been given for the defendant. Had Foster admitted the assignment of the note and the amount claimed as due thereon, the burden would then have been upon him and entitled him to the opening and closing. There was no error in the holding of the court.

The note is for \$450, maturing in five years lacking two months and fifteen days, and draws seven per cent. interest per annum. At the time the note was made, Pitman, who acted as agent for the Security Investment Company, withheld from the amount of the loan the sum of \$58.70, being three per cent. interest taken in advance. This left \$391.30, which Pitman claims was paid over to Foster after deducting \$20, paid for insurance and the making and examination of the abstract and some other expenses

connected with the loan. Under our statute, interest or any part of the interest agreed upon may, by express agreement of the parties, be taken in advance. *Rose v. Munford*, 36 Neb., 148; *Pierce, Wright & Co. v. Davey*, 43 Neb., 45; *Upton v. O'Donahue*, 32 Neb., 565; *Guthrie v. Hamilton*, 45 Neb., 766.

A careful computation demonstrates that the amount retained from the loan by way of advance interest and seven per cent. on the face of the note, \$450, does not exceed the statutory rate of ten per cent. There was no usury in the transaction, unless it arose from Pitman's, who acted as agent for the Security Investment Company in making the loan, deducting \$20 for the items above enumerated. There was a sharp conflict in the evidence upon the question whether Foster was to pay these items as a part of the expense of the loan. The jury found for the plaintiff below, and under the circumstances we can not interfere with that finding. We discover no reversible error in the record, and recommend that the judgment be affirmed.

ALBERT and AMES, CC., concur.

AFFIRMED.

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D. MURRAY CHESTON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ELLEN R. CHESTON, DECEASED, APPELLEE, V. SARAH A. WILSON, APPELLANT, ET AL.

FILED MARCH 19, 1902. No. 11,292.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: RULINGS ON EVIDENCE: HOW REVIEWABLE.** Rulings of a trial court in the admission of evidence are reviewable only by petition in error.
2. **Appeal and Error: COMPETENCY AND SUFFICIENCY OF EVIDENCE.** This court may, however, on appeal pass upon the competency of evidence admitted, in determining whether the decree is supported by sufficient evidence.
3. **Evidence: IDENTITY AND EXECUTION OF INSTRUMENT.** Testimony of a subscribing witness to an instrument that he recognizes his signa-



ture thereto and is acquainted with the parties, and, from that and his uniform practice not to witness any paper unless actually executed before him, he is satisfied and will testify that it was so executed, there being no showing to the contrary, is sufficient evidence of its execution.

APPEAL from the district court for Lancaster county.  
Tried below before FROST, J. *Affirmed.*

*Geo. A. Adams, for appellant.*

*S. L. Geisthardt, contra.*

POUND, C.

This is an appeal from a decree of foreclosure. The appellant argues a number of exceptions to rulings of the district court in the admission of evidence which are manifestly reviewable as such only by petition in error. *Zimmerman v. Zimmerman*, 59 Neb., 80. This court may, however, on appeal pass incidentally upon the competency of evidence admitted, in determining whether the decree is supported by sufficient evidence. The appellant has not asked us to examine the record from such point of view; but, as some of the objections argued might be urged in that way, we have considered them as if so raised, and do not think them of any merit. One of the witnesses testified that he had seen the principal defendant sign her name, though he could not say definitely where and when, and believed the signature to the note sued on to be hers. Whatever weight might be given to this were it disputed, it was competent and, standing uncontradicted, will support the decree. Another witness, whose name appeared as subscribing witness to an extension agreement, testified that he recognized his signature thereto, and, from that and his uniform practice not to witness any paper unless actually executed before him, he was satisfied and would testify that it was so executed. This was competent and sufficient. *Hall v. Luther*, 13 Wend. [N. Y.], 491; *Hamsher v. Kline*, 57 Pa. St., 397; *Miller v. Honey*, 4 H. & J. [Md. App.], 241; *Gaston v. Mason*, 1 N.

J. Law, 10; *Allen v. Trimble*, 4 Bibb [Ky.], 21. No evidence was adduced by defendants, and the court was justified in rendering a decree accordingly. We therefore recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

**AFFIRMED.**

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**CHESTER ANDREWS, APPELLANT, v. THE VILLAGE OF STEELE CITY, APPELLEE.**

FILED MARCH 19, 1902. No. 11,323.

Commissioner's opinion. Department No. 2.

1. **Waters and Watercourses: SURFACE WATERS: INJUNCTION AGAINST VILLAGE.** A city or village may not accumulate the surface waters which fall upon its site or any portion thereof and by means of a ditch or ditches discharge them in a volume upon the lands of another to his injury and damage. Injunction is a proper remedy to prevent and restrain such unlawful action.
2. **Evidence: SURFACE WATERS: FINDINGS IN EQUITY: CONFLICTING EVIDENCE.** Findings of the court examined, and found to be sustained by the evidence. The findings of a court of equity are entitled to the same consideration as the verdict of a jury in a law case; and if the evidence upon which they are based is conflicting, a court of review will not disturb them unless clearly wrong.
3. **Waters and Watercourses: MODIFYING DECREE.** The decree examined, and *held* that it should be modified, and, as modified, affirmed.

APPEAL from the district court for Jefferson county.  
Tried below before LETTON, J. *Modified and affirmed.*

*E. H. Hinshaw*, for appellant.

*John Heasty*, contra.

BARNES, C.

The appellant commenced this action in the district court for Jefferson county against the village of Steele City to restrain it from collecting the surface waters flowing and accumulating on a certain portion of the town site and discharging the same by means of ditches onto his

lands, thereby rendering a portion of the same worthless. After setting out a description of the appellant's lands and the fact that the appellee was an incorporated village, it was charged in the petition that a large portion of the land occupied by the defendant village is a low level tract of land, which is a natural reservoir for surface water accumulating on the lands surrounding it; that there is no natural outlet from the said low tract of land, but that the most easy and practical outlet is towards the west, and in a direction almost opposite from the land of the appellant; that there has never been any natural outlet for the water accumulating on the site of the defendant towards, upon or over the appellant's lands; that there is an elevation along the southern boundary line of the defendant, where the site of the village touches and abuts upon the lands of the appellant, which prevented the surface water accumulating upon the village site from flowing over and upon his land; that sometime during the year 1880, appellee dug a ditch through its said low tract of land and through the elevation of land between it and the lands of the appellant, and since then has constructed other ditches and a system of drainage running into said ditch constructed in 1880, and has thereby collected all of the water flowing, falling and accumulating upon the site of the village and discharged the same in a body through said ditch over and upon the lands of the appellant, rendering a large portion thereof worthless; that appellant has made suitable protests and objections to the village against its unlawful acts, and that in the year 1890 in settlement of a certain suit pending in the courts between the appellant and the appellee the village caused a ditch to be dug along the side of the highway from the place where the said ditch of 1880 discharged its waters, to the Little Blue river, and paid the costs of the said litigation in consideration of a withdrawal of the said suit by the appellant; that said ditch constructed by the defendant village in 1890 was sufficient for a long time to carry off all of the said surface water so discharged through the ditch of 1880, to the river and

away from the lands of appellant; that the appellee has failed and neglected to clean out, repair and maintain the ditch of 1890, so that the same has become useless; that it still continues to construct and maintain its system of drainage into the ditch of 1880, and has increased the accumulation and flow of the surface water therein and caused the same to overflow the lands of the appellant to his great and irreparable injury. The petition concluded with a prayer for a permanent injunction restraining the appellee from discharging said surface water upon the appellant's land, that it may be commanded and compelled by the court to protect said land from the surface water by the maintenance of proper ditches for carrying off the same, and for general equitable relief.

To this petition the appellee answered substantially as follows: Admitted that it was an incorporated village, incorporated under the laws of the state of Nebraska; alleged that the natural outlet for all surface water accumulating upon its site is, and always has been, over, across and upon the lands described in appellant's petition; alleged that about the year 1890 a ditch was constructed from a point where the corporate limits of appellee joined certain lands described in appellant's petition, along and upon the public highway leading south from said village for a distance of about one hundred rods to the Little Blue river; denied that said ditch was constructed by appellee, or by its agents, servants or employees; alleged that the ditch was constructed at appellant's request by popular subscription taken for that purpose, and that appellant contributed largely both in labor and money towards the construction of said ditch; that the same was dug almost solely for the benefit of the appellant in order to deflect said surface water from his lands into the Little Blue river; alleged that said ditch has, at all times, been of sufficient capacity to carry off all the surface water from the site of the defendant, but that appellant has failed and neglected to keep the same clean and free from mud and debris; that by reason of the said ditch having been con-

structed at the appellant's request and because he participated in the construction thereof, and because of his acquiescence in its location for nearly ten years, and by reason of the benefits he has derived therefrom he is estopped from in any manner complaining against the appellee. Said answer further denied each and every allegation contained in the appellant's petition not expressly admitted in said answer. To this answer there was a reply in the form of a general denial. On these issues the case was tried, a large amount of evidence was taken, considerable of which was conflicting, but which fairly showed that appellant was the owner of the premises described in his petition; that that portion of the site of appellee described therein, and known as Percel's & Thompson's first and second additions, were not annexed to, or a part of, the village until the year 1882; that in 1880 there was a short ditch dug near one Partlow's shop, but on the question as to whether or not this ditch increased the flow of the water onto the appellant's land, the evidence was conflicting; that since the construction of the ditch of 1880 and since these additions became a part of the village, appellee, by a system of street improvements, grades and ditches, has collected all of the surface water flowing and falling onto the said additions and has turned the same into said ditch of 1880, and thereby discharged the same in a body onto the lands of the appellant as described and set forth in his petition; that appellant sometime prior to the year 1890 commenced an action against the appellee for damages caused him by said acts, and that in 1890 a compromise of said suit was effected by the payment of the costs thereof by appellee and the construction of the ditch of 1890, as set forth in the appellant's petition; that for many years said ditch was sufficient to carry off all of said surface water and relieve the appellant's land from the burden thereof; that it has become filled up and does not now carry off the water; that appellant's lands for the last few years have been flooded by such surface water. At the close of the trial the court found, among other things, that

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the land occupied by that portion of the defendant village, known as Percel's & Thompson's addition to the village of Steele City, lies north of the premises of the appellant, and that a large portion of the surface water flowing from the north and east from the original village of Steele City and from the east portion of Percel's & Thompson's addition to the village of Steele City flowed in a natural channel or depression on said land in a southerly direction, and in such a manner as to discharge upon the land of the appellant; that on said land to the east of the highway running north and south there is a natural depression into which said surface water drained, and which, in times of flood and high water, formed a pond about two acres in extent upon appellant's premises.

The court further found that in the year 1880 a ditch was constructed running south from said land now occupied by Percel's & Thompson's addition to the village of Steele City, which carried the surface water, formerly flowing through said natural depression, onto appellant's land and discharged the same upon the land at another point from where it was discharged by the natural channel; that such surface water so discharged by the ditch still reached the aforesaid pond or depression in appellant's land; and that no additional burden was cast upon or damages caused to his land by reason of the construction of the ditch of 1880.

The court further found that in times of heavy rains and high waters a portion of the surface water upon said Percel's & Thompson's addition to the village of Steele City formerly flowed to the westward and southward and passed away through a natural depression in said direction, but that since the construction of the aforesaid ditch in 1880 the defendant village has graded its streets and constructed or dug ditches or gutters to the westward of said ditch of 1880 in such a negligent manner as to collect and discharge said waters which formerly flowed to the westward and southward, into said ditch, constructed in 1880, to the damage of appellant, by causing an in-

creased flow of surface water carelessly and negligently to flow through said ditch of 1880 to and upon the lands of appellant in such a manner that a larger portion of his land has been submerged in times of high water than had been before the drainage of said waters from the westward into said ditch.

The court further found that the appellant was entitled to be protected from said additional flowage caused by the diversion of the water which naturally flowed westward and southward in the neighborhood of the house of R. O. Partlow into the aforesaid ditch.

These findings were duly excepted to, and the court thereon rendered the following decree:

"It is therefore ordered and adjudged by the court that the defendant, the village of Steele City, be forever restrained and enjoined from diverting the surface water, which naturally flowed westward and southward in the neighborhood of the house of R. O. Partlow in said village by means of dams, street improvements or ditches, in such a manner as to cause said surface water to flow through the ditch constructed in 1880, and to discharge upon the lands of the plaintiff."

To this decree both parties excepted, and the plaintiff brought the case to this court on appeal.

1. It is urged by appellant that the relief granted him by the court is insufficient and inadequate, under the evidence and findings. On the other hand, it is claimed that the findings are not sustained by the evidence, and that no decree should have been rendered against the appellee. An examination of the evidence convinces us that it is amply sufficient to sustain the findings and the decree of the court. It is shown beyond question that the appellee, since the annexation of Percel's & Thompson's addition in 1882, has graded its streets and constructed its system of ditches so that it has collected all of the surface water falling, flowing and accumulating upon said additions and turned the same into the ditch constructed in 1880, thus causing the whole thereof to flow directly to and

upon the lands of the appellant; that by so doing it has greatly increased his burden as to said surface water and has caused him irreparable injury. It is the established law of this state that one may not accumulate the surface waters on his own land and by means of a ditch or ditches discharge them in a volume upon the land of another. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Lincoln Street R. Co. v. Adams*, 41 Neb., 737; *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545; *Jacobson v. Van Boening*, 48 Neb., 80, 66 N. W. Rep., 993. Many other cases might be cited in support of this doctrine, but we deem it unnecessary to refer to them. We therefore hold that the findings and decree of the district court upon this point should be affirmed.

2. It is contended by appellant that the court should have made a finding to the effect that there was a large amount of water collected upon the level and somewhat swampy town site, which went off naturally to the west and south in many other places than in the neighborhood of Partlow's house; and that the court erred in not making such finding and in not making a decree touching that phase of the case. A careful examination of the bill of exceptions fails to disclose any evidence which would sustain such a finding.

The finding of the court "that in times of heavy rains and high waters a portion of the surface waters, upon said Percel's & Thompson's addition to the village of Steele City, formerly flowed to the westward and southward and passed away through a natural depression in said direction, but that, since the construction of the aforesaid ditch in 1880, the defendant village has graded its streets and constructed or dug ditches or gutters to the westward of said ditch of 1880 in such a negligent manner as to collect and discharge said waters, which formerly flowed to the westward and southward, into said ditch constructed in 1880, to the damage of plaintiff by causing an increased flow of surface water carelessly and negligently to flow through said ditch of 1880 to and upon the said lands of



plaintiff in such a manner that a larger portion of the plaintiff's land has been submerged in times of high water than had been before the drainage of said water from the westward into said ditch," responds fully and completely to the evidence adduced upon that subject. We can not see how the court could have made any other or stronger finding upon this subject in favor of the appellant.

The findings of a court, in an equity cause tried without the intervention of a jury, are entitled to the same consideration as the verdict of a jury in a law case; and if there is any competent evidence to sustain them, or if the evidence bearing upon such findings is conflicting, this court will not review or disturb them. *Seymour v. Street*, 5 Neb., at page 89; *White Lake Lumber Co. v. Stone*, 19 Neb., 402; *Swartz v. Duncan*, 38 Neb., 782.

3. It is also contended by appellant that the court, by the decree, did not grant him all the relief he was entitled to. It was clearly shown by the evidence that the appellee, in the settlement of the case in 1890, agreed to, and paid, the costs therein and constructed a ditch along the highway from its boundary line to the Little Blue river, which for a long time was amply sufficient to relieve appellant's land from any damages by reason of the flow of surface water, but that the ditch has become obstructed and partially filled up and no longer serves the purpose for which it was constructed. It is not shown that appellee agreed to maintain the ditch, but we may assume that such was the understanding at the time of the settlement. If the village authorities would clean out this ditch and again make it effective, such action would be the best way of settling this difficulty, and would avoid all future trouble or controversy in relation thereto. If there was sufficient evidence to sustain it, a mandatory writ of injunction should be awarded commanding such action; but the evidence will not support such an order. It appears that the ditch of 1890 is situated wholly outside of the corporate limits of the appellee, and it may be that the corporation is prevented by some cause, over which it has no control,

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from taking such a course. Again, there may be a doubt as to its power to take such action. A mandatory writ of injunction will not be allowed against a local board where there is a doubt as to its power to perform the required act. Gould, Waters [3d ed.], section 554.

We think that the decree as it stands is not so broad in its terms as it should have been, and we recommend that the same be modified by adding thereto as follows: And the village of Steele City is hereby forever restrained and enjoined from in any manner causing or permitting the surface water falling or collecting upon that part of Percel's & Thompson's addition, from which the water flowed westward and southward prior to 1880, to flow or discharge upon the lands of the plaintiff, and that the decree, as thus modified, be affirmed.

OLDHAM and POUND, CC., concur.

The decree of the district court is modified by adding thereto as follows: "And the village of Steele City is hereby forever restrained and enjoined from in any manner causing or permitting the surface water falling or collecting upon that part of Percel's & Thompson's addition, from which the water flowed westward and southward prior to 1880, to flow or discharge upon the lands of the plaintiff"; and the said decree, as thus modified, is affirmed.


MODIFIED AND AFFIRMED.

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P. F. STILLINGS V. AMOS J. VAN ALSTINE ET AL.

FILED MARCH 19, 1902. No. 11,837.

Commissioner's opinion. Department No. 1.

1. Pleading: FAILURE TO PLEAD MATERIAL FACT: PRESUMPTION. A material fact, if not alleged, is presumed not to exist.
  2. Contracts: VOIDABLE BY THIRD PARTY: COUNTER-CLAIM OF DAMAGES: PLEADING DEFAULT. Where both parties allege a contract voidable
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at the pleasure of the postmaster general, and avoided by him, a counter-claim of damages on account of such avoidance which fails to state that it was caused by the default of the other party presents no ground of recovery.

ERROR from the district court for Douglas county.  
Tried below before SLABAUGH, J. *Affirmed.*

*Lysle I. Abbott*, for plaintiff in error.

*A. S. Churchill*, *contra.*

HASTINGS, C.

Plaintiff in error, defendant below, asks a reversal of the judgment rendered in this case on numerous grounds in his petition in error and motion for a new trial, but rests his case here upon the one proposition that the trial court erred in refusing to submit to the jury the question of damages sustained by him through the cancellation by the postmaster general of the contract for carrying mails entered into between the parties to this action. The defendant below is a government mail contractor, and plaintiff entered into a subcontract with him to perform certain services in the city of Omaha. By the terms of the subcontract plaintiff was to commence his services on July 1, 1898, and did so, the subcontract running for six years. Services were performed under it until October 19, 1898, when the contractor, Stillings, notified the subcontractor, Van Alstine, that the postmaster general had canceled it. Action was brought for compensation at the agreed rate during the time, and also for extra services claimed to have been performed to the amount and value of \$366.66. The defendant, Stillings, answered, admitting the contract and its terms as claimed, and alleging that the postmaster general of the United States had given permission for it, and that it was in accordance with defendant's contract with the United States; that the postmaster general reserved the absolute right to annul the contract at any time, and did annul it on October 4, 1898, and gave de-

fendant notice thereof, and instructed defendant to discharge plaintiff forthwith. He says that the postmaster general required defendant to make a new contract with some qualified person to continue the service which plaintiff had agreed to perform. The answer alleges payment of \$200 by defendant on the compensation provided for plaintiff by the subcontract, and denies generally. The answer also contains a counter-claim setting forth, first, that the contract between the defendant and United States, and the contract between defendant and plaintiff each provided that the latter might be annulled by the postmaster general; that the subcontract was annulled, and that the defendant was obliged to procure other parties to perform the services of the contract at an expense of \$3,000 per annum. Also alleges that fines to the amount of \$14.50 were levied by the postmaster general against plaintiff for the quarter ending September 30, 1898.

The trial court refused to permit evidence under the counter-claim and instructed the jury to disregard it, and this is the sole error which is now urged. A somewhat careful examination of the answer and counter-claim fails to disclose any allegation of any reason why the contract was canceled and annulled by the postal authorities. Both parties alleged that the right of cancellation by the postal authorities was absolute. It seems clear that the mere fact that the contract was canceled by one who had a lawful right to do so for any reason or without one, if he saw fit, would not of itself constitute a ground of complaint on the part of the contractor against his subcontractor, nor of itself raise any inference of fault or miscarriage on the part of plaintiff. If this is true, then there is no allegation, even inferentially, that the cancellation was caused by the default of plaintiff, Van Alstine. The trial court seems to have been entirely correct in declining to receive any evidence of such default or damages caused by it in the absence of any pleading on which to base such evidence.

It is urged on Van Alstine's behalf that it nowhere ap-

pears either by allegation or proof that the defendant had procured the necessary written assent of the postal authorities to make the subcontract, and that therefore he had in any event no valid contract, and had no right to recover. It is replied that the action being based upon that contract, plaintiff below can not here urge that the contract itself is void and of no effect. It is true that the action of Van Alstine is brought upon this subcontract, and the claim, so far as it was submitted to the jury, was based upon it, no proof having been admitted of the extra services claimed in the petition. The petition itself alleges, as above stated, that the subcontract was voidable at the pleasure of the postmaster general, and had been annulled by him. If the mere fact of avoidance by the postmaster general entitled the defendant, Stillings, to recover, it appears from the plaintiff's petition. It was probably not necessary for plaintiff to claim under the contract, but it seems clear that he has done so. The cause of action on which his judgment below is based is not the value of services rendered, but services rendered under this contract while it is claimed to have been in force and before receiving notice of its avoidance. The contract can hardly be good for purposes of enforcement by plaintiff, and bad for the same purposes on behalf of defendant, but defendant has failed to allege a breach. If there were in the defendant's counter-claim a sufficient allegation of default on the plaintiff's part in carrying out this contract and of damages arising out of such default, the claim that plaintiff is estopped from suing upon a contract and denying its legal existence would be good; but, as above stated, we discover nothing in the answer which impeaches plaintiff's allegation that the contract was absolutely avoidable at the instance of the postmaster general, and nothing was alleged to show that it was avoided because of plaintiff's default. A material fact not alleged is presumed not to exist. *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb., 523.

It is not thought that the case of *Gaines v. Trengrove*,

77 Minn., 349, cited and relied upon by plaintiff in error, covers this case. In that case two things appear which are certainly wanting in this. The consent and approval in writing of the postmaster general to the subcontract was shown and the cancellation of the contract on account of the breach of its performance by the subcontractor also appears. As above indicated, so long as plaintiff was claiming compensation under the contract, the first point would hardly make an important distinction, but where both parties are claiming an absolute right of annulment in the postmaster general, the failure of the second point to appear seems clearly vital.

It is recommended that the judgment of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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JOSEPH B. CARTER ET AL., APPELLANTS, V. ASHER D.  
WARNER, APPELLEE.

FILED MARCH 19, 1902. No. 11,333.

Commissioner's opinion. Department No. 2.

1. **Equity: ADEQUATE REMEDY AT LAW: DEFINITION.** The term "adequate remedy at law" means that the remedy at law must be plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
2. **Tortious Trespass: Possession.** No one can found possession on a tortious trespass alone; nor can any one acquire a right by the commission of a wrong.

APPEAL from the district court for Boone county. Tried below before KENDALL, J. *Reversed.*

*H. C. Vail*, for appellants.

*W. McGan* and *Jas. S. Armstrong*, contra.

OLDHAM, C.

On the 26th day of August, 1899, the appellants filed their petition in the district court for Boone county for,

and obtained, a temporary injunction against the appellee, restraining him from erecting a fence around a certain lot or piece of land in Hardy's addition to the village of St. Edward, in Boone county, and from interfering with the appellants' possession, use and enjoyment of said premises. This petition, in substance, alleges that plaintiffs (the appellants) are the owners of this land and are engaged in the business of buying and selling and feeding live stock, and for this purpose have erected feed sheds and are feeding stock therein, and that they have had exclusive possession thereof for more than nine months last past; that the defendant (the appellee) on the morning of this day came on the premises and commenced the erection of a fence thereon and is attempting to unlawfully deprive the appellants of the possession thereof and deprive the appellants of said feed yard, and is about to and threatens to wrongfully convert the same to his own use and will do so unless restrained from so doing; that the plaintiffs are without any adequate remedy at law, etc. To this petition the appellee filed his answer, denying the allegations of the petition and alleging that he is the owner in fee simple of the land, and that on the 26th day of August, 1899 (the day the suit was begun), he had possession and was using the same for keeping stock; that this possession was prior to and at the time this action was commenced. The appellants to this answer filed a general denial, and on these issues the case was tried to the court who made one finding, "That the plaintiff had an adequate remedy at law," and thereupon dismissed the case at the costs of plaintiffs, from which they appeal to this court.

The testimony discloses that along and abutting the right of way of the railroad that runs through this village is a triangular piece of land which for several years prior to August, 1898, was used by the appellee, Warner, as a feed lot on which were sheds, cribs and, in short, the usual appliances for feeding cattle; that Warner claimed to own it; that on August, 1898, he contracted to sell this feed lot to the appellants; that they were given possession

thereof, and in December, 1898, Warner procured a deed to be made from Long, who held the legal title, to the appellants and received the full purchase price. This tract was not numbered or otherwise designated and this deed from Long described the property by metes and bounds. It further appears that the description in the deed does not contain this entire tract, but leaves a small three-cornered piece directly north of it which fills out the triangle; that there was no dividing line between these two tracts, and that it all was used by Warner as a feed lot when sold to the appellants. The appellants, after coming into possession, built additional sheds, a part of which is on this three-cornered lot now claimed by Warner. That they believed from what Warner said at the time when they were talking with him about buying this feed lot that he owned all the land that he was using as such; that they had no knowledge to the contrary until after the improvements were made, the deed delivered, and the purchase price paid. But in April, 1899, they became aware of this fact and applied to Dr. Flory, who was looking after the affairs of one Hardy, who originally owned this addition, to purchase it to protect themselves. This application resulted in a deed to the appellants from Hardy for this land. This is a warranty deed executed and acknowledged in the usual form and dated August 3, 1899, and filed for record with the county clerk of Boone county on August 8, 1899. On August 12, 1899, Warner had a deed filed and recorded in the clerk's office of Boone county which purports to convey this same tract of land to him. This instrument is also signed by Hardy, but it is not acknowledged. In fact there is no acknowledgment attempted and it bears the date of February 6, 1896. By this deed Warner claims ownership and possession of this piece of land. It further appears that on the morning of August 26, 1899, Warner came upon the premises in question, without the consent and against the will of the appellants, and with material and help began to erect a fence thereon, and that he also turned therein ten head



of his hogs; that in a few minutes after this trespass was committed one of the appellants started to Albion, the county seat of Boone county, and during the day obtained the injunction which is the subject of this action. The question then presented is, do the facts as above indicated show that the appellants had an adequate remedy at law?

It is said by this court in *Welton v. Dickson*, 38 Neb., 767, that "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." To the same effect is the holding in *Bankers Life Insurance Co. v. Robbins*, 53 Neb., 44.

The above rule of this court is based upon *Watson v. Sutherland*, 72 U. S., 74, which in principle is analogous to the case under consideration. In that case Sutherland was in the mercantile business at Baltimore, claiming to be the sole owner of the stock of goods. Watson had recovered judgment against Worth & Fullerton and on this judgment procured a writ of *feri facias* and levied it on this stock of goods as the property of Worth & Fullerton; whereupon Sutherland obtained a temporary injunction restraining the sale, which on the hearing was made perpetual. The court on this point says: "It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity can not give relief, but it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. [U. S.], 210. How could Sutherland be compensated at law for the injuries he would suffer, should the grievances of which he complains be consummated?

"If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Worth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.

" \* \* \* 'Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass.' \* \* \* Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation can not be awarded in a trial at law.

"Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine*, brings the parties before it; hears their allegations and proofs, and decrees that the proceedings shall be unrestrained or else perpetually enjoined."

In the case at bar the appellants were using this entire tract in their business and it was so used by Warner before he sold the feed lot to appellants, and its use was necessary and beneficial to them in carrying on their business of feeding stock. This tract was limited in area and extent and the claim of Warner, if enforced, would deprive them of portions of this feed lot and of the use of their sheds that were located thereon for the protection of their stock. The measure of damages in an action at law, if Warner was defeated in his claim, would be the reasonable value of its use during the time that appellants were kept out of possession irrespective of the collateral or con-

sequential injuries that might have resulted to their business and their stock. This by the rules of the common law can not be compensated in damages, and for this reason the remedy at law is inadequate.

An act, the result of which is to curtail or destroy a portion of the business in which a person is engaged, is an injury to his business. It would seem to require no demonstration in this case to show that in being deprived of a portion of this feed lot the appellants' business was destroyed in respect to these premises in the proportion that this tract in dispute bore to the whole lot. And again, the appellants were in peaceable possession of, and carrying on their business of feeding stock on these premises and they had the right to conduct this business without interruption over the entire tract until they were dispossessed by some process of law, not by force. This forcible interruption is an injury to their business which a court of equity will not suffer.

It is pleaded by way of answer and supported by some proof that the fence was built on, and the hogs were turned into, the tract in dispute before the injunction was actually issued. This was for the purpose, doubtless, of asserting the proposition that if the act complained of had been accomplished the injunction is unavailing. But at most all that was accomplished was the building of the fence and the turning in of the hogs. If it is claimed that these acts gave Warner possession, then to this we can not assent. No one can found possession on a tortious trespass alone; nor can any one acquire a right by the commission of a wrong. These principles are elemental and pervade all jurisprudence.

It therefore follows that the court below erred in holding that appellants had an adequate remedy at law, and we recommend that the judgment of the district court be reversed and the cause remanded.

**BARNES and POUND, CO., concur.**

**REVERSED AND REMANDED.**

POUND, C., concurring.

I concur in the decision, but think the statement in paragraph two of the syllabus too strong. A trespass may not amount to taking possession, but at the same time possession may be gained by a trespass, and often is.

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THE CONTINENTAL NATIONAL BANK OF CHICAGO, APPELLANT, V. LYDIA LEVY ET AL., APPELLEES.

FILED MARCH 19, 1902. No. 11,339.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: CONFLICTING EVIDENCE.** It is a settled rule of this court that the findings of the trial court, on conflicting evidence, will not be reversed on appeal unless clearly wrong.
2. **Appeal and Error: ACTION TO SET ASIDE CONVEYANCE: EVIDENCE.** Evidence examined, and held sufficient to sustain the findings of the trial court.

APPEAL from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

W. W. Morsman, for appellant.

John W. Lytle, contra.

ALBERT, C.

This is an appeal from a decree entered by the district court for Douglas county dismissing a suit brought by the appellant to set aside a conveyance of real estate alleged to have been made in fraud of the appellant and other creditors of one of the appellees. It is first insisted that this court should weigh the evidence precisely as though it had never been passed upon below, and make findings wholly unaffected by those of the trial court. A contrary rule, often reiterated by this court, has prevailed for a quarter of a century. In our opinion it is too late to call it in question. This leaves but one question in the

case, and that is, whether the findings and decree of the trial court are sustained by sufficient evidence. We have examined the evidence with more than usual care, and are satisfied that it is ample to that end.

It is recommended that the decree of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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ANNIE D. WRIGHT, APPELLEE, v. FRANK G. PATRICK ET AL.,  
APPELLANTS.

FILED MARCH 19, 1902. No. 11,343.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: APPRAISAL: DEDUCTION OF LIENS.** The deduction of prior liens in appraising lands for judicial sale being for the benefit of the creditor, the owner of the lands is not prejudiced by failure to deduct liens and may not complain thereof.
2. **Mortgage Foreclosure: CERTIFICATES OF LIENS FROM TREASURER: PRESUMPTION.** Where the treasurer, upon due application by the sheriff, furnishes two certificates of the amount of taxes due upon the lands to be sold, the later certificate will be presumed to be correct.

APPEAL from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

V. O. Strickler, for appellants.

B. G. Burbank, contra.

POUND, C.

This is an appeal from an order confirming a sale of lands under decree of foreclosure. The first objection argued is that no certificate of liens was obtained from the register of deeds or from the clerk of the district court. But the deduction of prior liens in appraising lands for judicial sale is for the benefit of the creditor. *Ballou v. Sherwood*, 58 Neb., 20; *American Investment Co. v. Mc-*

*Gregor*, 48 Neb., 779.  
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We recommend that

BARNES and OLDHAM

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Commissioner's

- 1 **Pleading Overpayment:**  
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- 2 **Evidence of Weights of**  
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Garrison v. Murphy.

ERROR from the district court for Cass county. Tried below before JESSEN, J. *Affirmed.*

*Byron Clark and C. A. Rawls, for plaintiff in error.*

*Matthew Gering, contra.*

HASTINGS, C.

Two questions arise in this case. The first is whether or not the following allegation of payment by mistake is sufficient, after a verdict, to support a judgment for plaintiff:

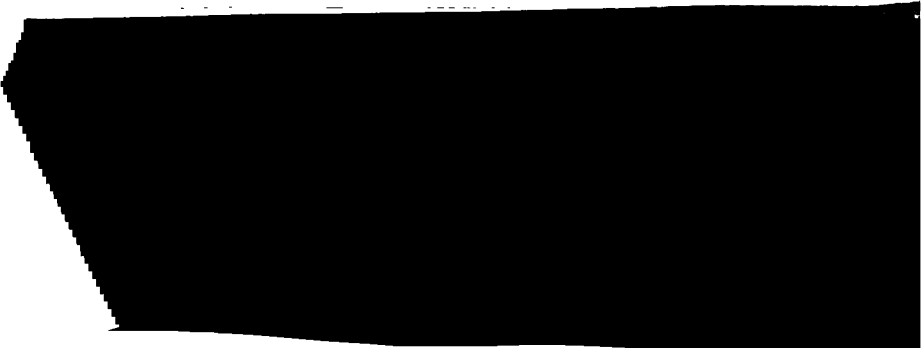
"That from said 22d day of January, 1896, until the month of December, 1898, this plaintiff paid to the defendant for interest upon said \$3,200 the sum of \$1,323.45, and that the sum over and above the interest due upon said \$3,200 was paid to said defendant by the plaintiff at the defendant's special instance and request and without any knowledge upon the part of the said plaintiff that such sum overpaid the defendant the interest upon said \$3,200."

Plaintiff alleged a loan of \$3,200 at eight per cent. per annum, and its repayment, and in the above terms an overpayment of interest. It is insisted, on the authority of *Renfrew v. Willis*, 33 Neb., 98, that the foregoing allegation shows only a voluntary payment of money, and therefore is no basis for the verdict and judgment in favor of the pleader in this case. In the *Renfrew Case* the plaintiff set out a lease, the payment by cash and labor of \$3,372.22 at defendant's request "by virtue of the lease," and that defendant was entitled to \$1,600 and no more, and the rest was due plaintiff. The allegation of the petition in the present case distinctly alleges that the payments were for interest and not only at defendant's request, but without knowledge on defendant's part that such sums overpaid the interest due. The difference between the two petitions seems to be that in *Renfrew v. Willis* no mistake nor lack of knowledge was apparent from the pleading, and the court adds that none was

shown in the evidence, and on both grounds the case was reversed. In the present case there is no claim of any lack of evidence to sustain the verdict for plaintiff either in the county court or on appeal in the district court. It seems to us that the statement in the present petition does amount to an assertion of mistake in the amount of interest and of its payment at defendant's special request under the mistaken supposition that it was a part of the interest provided by the contract.

It is conceded by counsel that if the facts which are found by the jury appear in the pleading, however vaguely or inartistically they may be set forth, it will be sufficient to sustain the verdict. In this case the pleading apprised the defendant of what was to be proved and evidently led to quite complete preparation of proof as to the mistake. The allegation of entire want of knowledge that the payments made were in excess of the amount due and that they were paid for interest at defendant's special request seems enough, in the absence of any demand for a more definite statement, and after verdict, to uphold the judgment. As we have concluded that the original petition, while indefinite enough to subject it to a motion to make it more certain, was, nevertheless, sufficient to sustain the verdict, it is not necessary to discuss the amendment allowed by the court and its effect. It certainly can not be, and is not, claimed to weaken in any way the original allegation.

The other question raised is as to an alleged error in refusing to strike out certain evidence of the plaintiff, Garrison, as to corn received by defendant in the years 1896, 1897 and 1898. This was on the ground that the witness had testified to certain memoranda of weights, and had then stated on cross-examination that these memoranda were copied from scale tickets showing the weights. The motion to strike was too broad in any event. It included all the evidence of the witness as to the number of bushels of corn, and surely much which the witness had testified to was competent. He had testified as to the





Northwall Co. v. McCormick Harvester Machine Co.

amount and character of the crops on different parts of the field in different years, and the motion, if good at all, could only be properly aimed at the testimony as to weights.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

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**THE G. T. NORTHWALL COMPANY V. THE MCCORMICK HARVESTER MACHINE COMPANY, SUBSTITUTED FOR CHARLES B. STRONG, SHERIFF OF JOHNSON COUNTY.**

FILED MARCH 19, 1902. No. 11,354.

Commissioner's opinion. Department No. 2.

1. **Replevin: GENERAL DENIAL: PROOF OF RIGHT TO POSSESSION: DIRECTING VERDICT: MEASURE OF DAMAGES.** In an action of replevin, where the plaintiff claims to be the absolute owner of the property and entitled to the immediate possession of it, and the defendant's answer is a general denial, the plaintiff must establish his ownership or the right to the immediate possession of the property by some competent evidence. If he fails to do this, it is the duty of the court to direct the jury to return a verdict for the defendant. In the absence of any showing to the contrary the value of the defendant's right of possession is the value of the property in controversy.
2. **Appeal and Error: REVIEW OF RULINGS ON EVIDENCE.** The rulings of the trial court on the admission of evidence examined, and *held* that there was no error therein.

ERROR from the district court for Johnson county.  
Tried below before STULL, J. *Affirmed.*

*L. C. Chapman*, for plaintiff in error.

*M. B. C. True and Wilson & Brown*, *contra.*

BARNES, C.

The G. T. Northwall Company commenced an action in replevin in the district court for Johnson county against Charles B. Strong, described as sheriff of that county. By its petition it claimed to be the general owner and

entitled to the immediate possession of two light one-horse buggies. The petition was in the usual form. To this petition the following answer was filed (omitting title): "Now comes the said defendant, and for answer to the plaintiff's petition says that the said plaintiff has no capacity to sue in the courts of this state, and denies each and every allegation contained in said petition." Upon the issues thus joined a trial was had, and after the introduction of the evidence the court instructed the jury to return a verdict for the defendant, which it did, in the words and figures following (omitting title): "We, the jury, being duly impaneled and sworn in the above entitled cause, do find for the defendant; do find that at the commencement of this action the right to the possession of the property replevied in this action was in the defendant; that the value of said property was \$84, and that the value of the defendant's possession is \$84, and his damage is assessed at one cent." Upon this verdict the following judgment was rendered: "Now on this 2d day of May, 1899, this cause came on for hearing upon a motion by the plaintiff for a new trial herein, upon consideration whereof, after being fully advised in the premises, the court overrules said motion, to which ruling of the court the plaintiff excepts. It is therefore considered, ordered and adjudged that the defendant have and recover from the plaintiff the property in question herein; or in case a return of the same can not be had, that the said defendant have and recover of and from the said plaintiff the sum of \$84, the value of the said property and the value of the defendant's possession of the same, and one cent, his damages sustained by reason of the detention of said property, as heretofore by the verdict of the jury found, and his costs in this behalf expended, taxed at the sum of \$—, to all of which the plaintiff excepts. The plaintiff is hereby given forty days from the rising of the court to present its bill of exceptions." The motion for a new trial was, as a matter of fact, not filed until the 3d day of May, the day after the judgment was rendered

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and the case finally disposed of. On the 6th day of May, after the judgment had been rendered and the case finally disposed of, the court, on the application of the defendant, permitted the McCormick Harvester Machine Company to be substituted as the defendant in the action. The case was thereupon brought to this court by a petition in error.

1. The plaintiff contends that there was no evidence offered by the defendant showing the value of the defendant's possession, and that the finding of the jury was without evidence to support it; that the defendant did not in any way attempt to justify his taking of the property; that the defendant did not show any right of possession whatever; that there was no evidence to support the finding of the jury wherein they say in their verdict, "that we find for the defendant." Therefore the judgment of the court is erroneous and must be reversed. It will be observed that, as the issues stood at the time of the trial, plaintiff claimed to be the general owner and entitled to the immediate possession of the property in controversy. The defendant denied all the allegations of the plaintiff's petition, and it devolved upon the plaintiff to prove his ownership and his right to the immediate possession of the property. An examination of the bill of exceptions will show that there was no evidence introduced by the plaintiff to establish either his ownership or his right to the possession of the property. The plaintiff in an action of replevin must recover upon the strength of his own title, or the right of possession to the property in controversy. *Goodman v. Kennedy*, 10 Neb., 270; *Bardwell v. Stubbett*, 17 Neb., 485; *Peterson v. Lodwick*, 44 Neb., 771; *St. John v. Swanback*, 39 Neb., 841; *Kavanaugh v. Brodball*, 40 Neb., 875. It was held by this court in *Johannson v. Miller*, 45 Neb., 53, that in replevin the right of possession must be affirmatively shown to exist in favor of the plaintiff, and the plaintiff's right to recover can not be predicated upon the mere failure of the defendant to affirmatively establish in his own favor a superior right in that respect. In *Peterson v. Lodwick*, 44 Neb., 771, it was held that

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where the plaintiff failed to prove his own title it was proper for the court to instruct the jury to return a verdict for the defendant. There is no evidence in the record to support any claim or right to the goods in controversy in the plaintiff, the Northwall Company; no other verdict could have been returned by the jury than one in favor of the defendant. Therefore the court did not err in directing the jury to return such a verdict.

It is contended that there was no evidence as to the value of the defendant's possession upon which the jury could base its finding on that question. An examination of the record will show that it was stipulated that the value of the buggies in controversy was \$105. The jury found the value of the defendant's right of possession to be \$84, which was within the value of the property, fixed by the verdict. In the absence of any evidence to the contrary, where plaintiff has no right to, or interest in, the property, the value of the defendant's right of possession is the value of the goods as found by the jury. Therefore the finding of the jury upon this question was not prejudicial to plaintiff and should be sustained.

2. It is contended that the court erred in sustaining defendant's objection to the introduction of exhibit No. 1. An examination of this exhibit, found on page 20 of the bill of exceptions, discloses that it is a blank order to the G. T. Northwall Company for the shipment of goods; it contains no description of any kind of goods or property whatever. Upon its face it proves nothing. The testimony offered in relation to it was insufficient to connect it in any manner with the property in controversy. For this reason the court properly excluded it from the consideration of the jury, and did not err in refusing to allow it to be introduced in evidence.

The record in this case discloses that no other verdict could have been rendered by the jury, and we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

Mercantile Co-operative Bank v. Schaaf.

MERCANTILE CO-OPERATIVE BANK, APPELLANT, v. CONRAD  
A. SCHAAF, APPELLEE.

FILED MARCH 19, 1902. No. 11,379.

Commissioner's opinion. Department No. 2.

**Building and Loan Associations: ACCOUNTING: VALUE OF STOCK.** In an accounting between a foreign building and loan association and a member to whom a loan has been made, if credit is given the member for the amount paid upon the stock, it must be on the theory that such amount represents the value thereof, he having elected to apply it on the debt. Hence, where such sum is credited to the borrower, no further deduction should be made for value of the stock.

APPEAL from the district court for Lancaster county.  
Tried below before HOLMES, J. *Reversed with directions.*

*Sawyer & Snell*, for appellant.

*F. A. Boehmer*, contra.

POUND, C.

This suit was brought to foreclose a mortgage given by appellee to appellant, which is a foreign building and loan association. The transaction in question did not involve any question of usury, as the interest and premiums amount to less than ten per cent., and took place prior to the enactment of the present statute. Appellee in his answer elected to have his stock applied upon the mortgage debt, and the sole question, under the evidence, is as to the amount due and the methods by which such amount is to be ascertained. The principles governing an accounting of this sort have been laid down in *People's Building, Loan & Savings Association v. Gilmore*, 1 Neb. [Unof.], 181, and *McDowell v. Pioneer Savings & Loan Co.*, ante, page 24. Judged by these principles, we think the decree is wrong. The district court took the total amount paid by the borrower to the association and, adding thereto the value of the stock, deducted the aggre-

Schoenhofen Brewing Co. v. Whipple.

gate from the amount of the loan and interest thereon. In the cases cited it was held that the member might have his stock applied upon the debt if he so elected; that in the absence of evidence as to its actual value the stock would be taken to be worth the amount that had been paid upon it; that payments made on the stock were not to be applied as payments on the loan until the borrower had elected to have them so applied and, in consequence, that credit for the value of the stock should be given as of the time of such election, not as of the time when the several payments were made. It follows that if credit is given for the amount paid upon the stock, it must be upon the theory that such amount represents the value thereof. Hence, where such sum is credited to the borrower, no further deduction should be made for value of the stock.

We think the decree should be reversed and the cause remanded with directions to enter a decree of foreclosure for \$450.60 and interest at the rate of four and four-fifths per cent. from March 16, 1900.

BARNES and OLDHAM, CC., concur.

The decree of the district court is reversed and the cause remanded with directions to enter a decree of foreclosure for \$450.60 and interest at the rate of four and four-fifths per cent. from March 16, 1900.

REVERSED WITH DIRECTIONS.

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THE P. SCHOENHOFEN BREWING COMPANY V. JOHN C. WHIPPLE ET AL.

FILED MARCH 19, 1902. No. 11,388.

Commissioner's opinion. Department No. 2.

1. Intoxicating Liquors: "SLOCUMB LAW": STATUTES. Chapter 50 of Compiled Statutes of Nebraska, commonly known as the "Slocumb Law," is a rigid, drastic and prohibitive enactment denouncing all sales of intoxicating liquors not made strictly in compliance with its provisions.

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2. **Intoxicating Liquors: VALIDITY OF SALE: LEX LOCI.** The validity of a sale of intoxicating liquors is determined by the law of the place at which the sale is made.
3. **Intoxicating Liquors: CONTRACT: CONSIDERATION.** No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. *Storz & Iler v. Finklestein*, 46 Neb., 577, followed.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

*G. W. Shields*, for plaintiff in error.

*Charles F. Tuttle and H. A. Whipple*, contra.

OLDHAM, C.

This was an action by the plaintiff brewing company against the defendants to recover on a bond for the purchase price of beer sold by the plaintiff to the defendant, German Village Company. The material allegations of the petition are that the plaintiff is a corporation organized under the laws of the state of Illinois and that the defendant, German Village Company, is a corporation organized under the laws of the state of Nebraska and doing business in the city of Omaha; that from the 21st day of March, 1898, and up to the 4th day of June, 1898, the German Village Company was a copartnership consisting of Charles F. Beindorff and John C. Whipple; that on the 4th day of June, 1898, the said partnership was dissolved and all the rights, credits, effects and contracts were assigned to, and became the property of the German Village Company; that among the effects, so assigned, was a concession issued to the copartnership by the Trans-Mississippi & International Exposition Company for the running of the German Village on the east midway of the said Trans-Mississippi & International Exposition Company's grounds, and also an agreement between the plaintiff and the said copartnership. (A copy of this agreement is attached to and made a part of the petition.) The

material conditions of this agreement are: That the co-partnership agrees to purchase from the P. Schoenhofen Brewing Company, through its local representative in the city of Omaha, Henry Rohlf, all malt beer in bottles and in wood used by the said parties of the second part or sold by them in the said German Village (except that they shall have the right to purchase and sell beer manufactured in other countries than the United States), and pay for the same at the end of each week. Then follows the price which they agree to pay and their agreement to return the empty kegs, cases and bottles to plaintiff's agent at the German Village. This is followed by an agreement on the part of the plaintiff to pay the sum of \$3,000 to the parties of the second part to aid in the construction of the German Village. There were other conditions in this agreement which are immaterial in this controversy. But it was further agreed in the contract that plaintiff should furnish and deliver the beer to the parties of the second part in good condition at the German Village. It was also agreed that the parties of the second part were to furnish a bond in the penal sum of \$5,000, conditioned for the faithful performance of the conditions of the agreement with Charles Beindorff, father of said Charles F. Beindorff, as surety thereon. It was also agreed that the concession should not be assigned by the said parties of the second part without notification to the party of the first part, and that the bond should be held liable for the fulfillment of this contract by such assignee. This contract was signed by P. Schoenhofen Brewing Company by its secretary, and Charles F. Beindorff and John C. Whipple. To this contract is attached a bond as provided for in the contract, in the penal sum of \$5,000. This bond runs to P. Schoenhofen Brewing Company and provides for the faithful performance of the contract above set out by the parties of the second part and it is signed by Charles F. Beindorff and John C. Whipple as principals and Charles Beindorff as surety. The petition then goes on and alleges that at the



## Schoenhofen Brewing Co. v. Whipple.

time of making this agreement that the plaintiff had no license to sell malt, spirituous or vinous liquors in the city of Omaha and state of Nebraska, but that it had an agent, whose name is Henry Rohlff, who had a license duly issued to him by the proper authorities to sell malt, spirituous and vinous liquors in the city of Omaha and state of Nebraska, and that for the purpose of complying with the liquor laws of the state of Nebraska and the city of Omaha it was provided in the contract that the sales contemplated in the said contract should be made through the said Henry Rohlff, as agent for plaintiff. The petition then proceeds to set out the sales of beer made to the German Village by the plaintiff in reliance on this contract and bond, and sets up by proper allegation that there is due the said plaintiff on said contract for beer so sold and delivered the sum of \$882, and that the conditions of the bond have been broken by failure of the principals therein to pay for said beer as provided for in their contract, and prays judgment against all the defendants for the sum of \$882 and interest. To this petition the defendant interposed a demurrer. The demurrer was sustained by the trial court, and plaintiff refusing to further plead its petition was dismissed and it brings error to this court.

An examination of the contract on which plaintiff's action is founded shows clearly that the contract was made in Nebraska and was for the sale and delivery of intoxicating liquors within this state by one who had no license or legal authority to engage in the traffic, but who sought to avoid the consequences of his act by having the sale and delivery of the goods nominally made by Henry Rohlff, a licensed dealer in intoxicating liquors, as his agent. Henry Rohlff is neither a party to the suit or the contract and bond on which the right of action is predicated. The only reference to Henry Rohlff in the contract is that the defendants agree to purchase from the plaintiff through its local representative in the city of Omaha, Henry Rohlff, all its malt beer of American brew, etc.

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In other words, the defendants agreed to buy all their American brewed beer from plaintiff through its agent, Henry Rohlf; and by other terms of the contract plaintiff agreed to sell and deliver its beer to the German Village at its village in the city of Omaha and state of Nebraska. Then the question is, can the plaintiff, an unlicensed dealer in intoxicating liquors, recover in the courts of this state for the purchase price of beer sold under such a subterfuge as this? We think not. Chapter 50 of the Compiled Statutes of Nebraska, commonly known as the "Slocumb Law," is a rigid, drastic and prohibitive enactment denouncing all sales of intoxicating liquors not made strictly in compliance with its provisions. The public policy of this statute is to restrain and punish every form of traffic in intoxicants that is not guarded, shackled, licensed and taxed by the strict provisions of this chapter. *State v. Cummings*, 17 Neb., 311.

The question of the right to recover for the purchase price of liquors since the passage of this enactment has been before this court on several occasions. One of the early cases is that of *Delahaye v. Heitkemper*, 16 Neb., 475. In this case an action was brought on a promissory note. The defense interposed was that the note was given as the purchase price of liquors sold in the state of Iowa, and that under section 1550 of the Iowa Code of 1873 the sale was illegal; and the answer pleaded the provisions of that section and asked by way of set-off to recover against the plaintiff a part payment made for the liquors. The court held that the Iowa statute, not being in contravention of the public policy of the laws of this state, would be enforced here. The action on the note was dismissed and the defendant was permitted to recover back the part payment he had made on such purchase, as provided for in the Iowa statute.

In the case of *Gillen v. Riley*, 27 Neb., 158, the action was brought by a licensed dealer doing business in the city of Omaha and was for the recovery of the purchase price of liquors sold to a licensed dealer whose place of business

## Schoenhofen Brewing Co. v. Whipple.

was in Dixon county, Nebraska. In this case the plaintiff was permitted to recover, the court holding that under his license to sell intoxicating liquors he might send his agents out and take orders in any part of the state for orders to be selected and forwarded from the stock kept in his store at his place of business.

The next case of this nature before this court was that of *Wagner v. Breed*, 29 Neb., 720. This case arose on an action to foreclose a mortgage given to secure promissory notes executed by Breed to Wagner. The consideration of the notes was an indebtedness from Breed to Wagner for intoxicating liquors sold by Wagner to Breed. Wagner was engaged in business in Rock Island, Illinois. Plaintiff was permitted to recover in this case, but the question turned on the legality of the sale at the place where made. It appears that Wagner was a licensed dealer in the state of Illinois and that the orders were sent to him by Breed from Nebraska, and that these orders were filled at Rock Island, where Wagner had a right to engage in the traffic. This case is easily distinguished from the case at bar in this, that the place of sale in the case at bar was at Omaha, Nebraska, while in *Wagner v. Breed*, *supra*, the place of sale was at Rock Island, Illinois.

It is a rule almost uniformly recognized that the validity of a sale of intoxicating liquors is determined by the law of the place at which the sale is made. The modification of this rule is that even if the sale would be valid where made, yet, if the vendor knowingly aids the vendee in conveying the liquors, so sold, to another state or place with the view to their being resold by the vendee contrary to the laws of such state or place, then the sale would be illegal. *Graves v. Johnson*, 15 L. R. A. [Mass.], 834; *Webster v. Munger*, 8 Gray [Mass.], 584; *Banchar v. Mansel*, 47 Me., 58.

Another case before this court, and the one that we think controls the case at bar, is that of *Storz & Iler v. Finklestein*, 46 Neb., 577, 65 N. W. Rep., 195. In this case plaintiff sued to recover the purchase price of beer sold to

defendant. Defendant plead an agreement on the part of plaintiff to procure him a license and a failure to do so and asked for damages in the amount he was compelled to pay for such license. Plaintiff replied by pleading a custom, which they alleged was a part of the contract, that defendant was to sell as agent for plaintiff under the license they had procured for their bottling works. Plaintiff was not permitted to recover, the court holding that "No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." This case seems to settle definitely the proposition that one individual can not sell intoxicating liquors for his own benefit under the protection of a license issued to another.

The next case before this court was *Rocco v. Frapoli*, 50 Neb., 665. In this case suit was instituted for damages on a consignment of a car-load of wines and brandies made by plaintiff from California to the defendants who were commission merchants engaged in business in the city of Omaha, Nebraska. The consignment was made on an agreement that the defendants were to have a commission on all the wines and brandies sold from such consignment. Neither of the parties to the contract were licensed dealers in intoxicating liquors in the state of Nebraska. The court denied a recovery because the contract was contrary to public policy.

It seems to follow from a review of these authorities that one who is not a licensed dealer in intoxicating liquors under the laws of this state can not recover the purchase price of liquors which he sells in violation of law; and it also seems well established that one can not shield himself from the consequences of an illegal sale of liquors made in his own name and for his own benefit either by pretending to act as agent for a licensed dealer, or by using one who is a licensed dealer as a pretended agent for him in the transaction.

We are therefore of the opinion that the judgment of the learned trial court in sustaining the demurrer to plain-

Heater v. Penrod.

tiff's petition was right and we recommend that it be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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ABNER HEATER V. CHARLES J. PENROD ET AL.

FILED MARCH 19, 1902. No. 11,397.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: DAMAGES FOR CONVERSION: EVIDENCE SUFFICIENT.**  
Evidence examined, and *held* to support the finding of the jury.
2. **Appeal and Error: OBJECTION AFTER VERDICT OF NO PETITION ON FILE.**  
After having gone to trial upon the theory that the petition was duly filed, a defeated party can not, after verdict against him, be heard to urge that there was no petition on file and no cause pending before the court.
3. **Trial: MISCONDUCT OF COUNSEL: PREJUDICE.** The argument of counsel to the jury should be limited to a discussion of the facts in evidence and the reasonable inferences deducible therefrom. Certain language in argument, while a slight departure from the legitimate rules of debate, *held* not to have been prejudicial to defendant's rights.

ERROR from the district court for Lancaster county.  
Tried below before HOLMES, J. *Affirmed.*

*Billingsley & Greene* and *R. H. Hagelin*, for plaintiff in error.

*Mockett & Polk* and *George Risser*, contra.

DAY, C.

Charles J. Penrod brought this action in the district court for Lancaster county to recover damages from the defendants for the conversion of certain household goods belonging to the plaintiff. Upon the trial a verdict was returned in favor of the plaintiff against all of the defendants, upon which judgment was rendered. To review this judgment the defendant, Abner Heater, has brought the case to this court by proceedings in error.

It is urged by the defendant, Heater, that the evidence is not sufficient to sustain the verdict against him. While there is a direct conflict in the evidence it is, in our opinion, sufficient to sustain the verdict. It was shown that during the absence of the plaintiff from his home his household goods were removed therefrom and stored in the defendant's warehouse. Why the goods were taken or by whom appears only inferentially. That defendant, Heater, knew that the goods belonged to the plaintiff is clearly established. It was also shown that Heater had said in a conversation with one of the witnesses that he proposed to keep the goods until the plaintiff paid a rent bill he owed him. When demand was made upon him for the goods he denied having them; he admitted, however, they had been in his possession, but claimed they had been taken away. It was also shown that he asked the plaintiff what he would do on the rent account if he (Heater) got his goods back for him.

Without attempting to review the evidence on the question of Heater's liability, we think there is sufficient in the record to sustain the finding of the jury. The facts proven bring the case clearly within the rule announced in *Hill v. Campbell Commission Co.*, 54 Neb., 59, wherein it was held that "Every one who aids and assists in the conversion of the chattels of a third person, is liable for their value."

It is also argued that there was no petition on file upon which a judgment could be based. This contention is without merit. The petition was filed May 21, 1898. An amended petition was filed February 14, 1899, which was by order of court stricken from the files and an order made giving leave to the plaintiff to refile the original petition. The record does not show affirmatively that this was done. The case was tried, however, upon the theory that the petition was duly filed, being so treated by both parties to the action as well as the court. After having gone to trial upon the theory that the petition was duly filed a defeated party can not, after verdict against him, be

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heard to urge that there was no petition on file and no cause pending before the court.

It is contended that plaintiff's counsel, in arguing the case to the jury, made use of language which was inflammatory and tended to prejudice the jury against the defendant, Heater. The language used characterized the defendant, Heater, as the "Judas of the whole controversy, the man behind the whole conspiracy to deprive this young man of his property; he is the man who has put the wheels in motion, who has wronged us beyond everybody else." Objections were made to the language of counsel, which were overruled. The argument of counsel to the jury should be limited to a discussion of the facts in evidence and the reasonable inferences deducible therefrom. We do not think the language objected to is of such a character as would unduly incite the jurors or arouse in their minds a prejudice against the defendant. The language was, perhaps, a slight departure from the legitimate rules of debate, but we do not believe that it was prejudicial to the defendant's rights. *Angle v. Bilby*, 25 Neb., 595.

The plaintiff offered in evidence certain declarations of one of the defendants which were made out of the presence of the defendant, Heater. The introduction of this testimony is now assigned as error. It is clear that the declarations of the defendants made out of the presence of each other were received as evidence only against the declarant. It was perfectly competent as against the declarant and such other defendants as were present at the time. We see no error in admitting this testimony.

Complaint is also made to the giving of instruction No. 5. It is urged that the instruction gives the impression that the jury may find against all of the defendants if they found that one of them is connected with the transaction. That part of the instruction referred to is as follows: "Therefore the question to be determined by you in this case, under the evidence now before you, is whether or not the defendants or either of them carried

away and converted to their own use the property in plaintiff's petition described, without the consent or authority of the owner thereof, and have failed and refused to account therefor." The vice complained of in this instruction, if any there be, is made clear by instruction No. 6, where the jury are told that "in event you find from the evidence that only one of said defendants so appropriated and converted such property in manner as alleged in the plaintiff's petition, then you should find against such defendant and in favor of the defendant whom you believe to be from the evidence to have not been connected in such unlawful act."

After a careful examination of the record, we do not believe the numerous errors alleged in the motion for a new trial and the petition in error have been prejudicial to the rights of defendant, Heater. The other defendants did not file a motion for a new trial or a petition in error, and while one of them has filed a brief in this court it presents nothing which we can review.

We therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

## WILLIAM BOKHOOF V. JOHN M. STEWART, SHERIFF OF HOLT COUNTY.

FILED MARCH 19, 1902. No. 11,409.

Commissioner's opinion. Department No. 2.

1. **Judgment: RENDERED ON ANSWER DAY: WAIVER: COLLATERAL ATTACK.** While it is irregular and erroneous to render judgment on answer day, such irregularity may be waived by not taking advantage thereof, and a judgment so rendered is not open to collateral attack.
2. **Vendor and Purchaser: FRAUDULENT INTENT IN SALE.** On an issue as to the validity of a sale of cattle as against creditors, the circumstances that the cattle remained at all times in the possession of the vendor; that no payment was made till long after the alleged date of the sale; that the vendor was insolvent; that there



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was no inspection of the cattle before purchase; that a check given in payment was not presented for some time after the date it bears, and not till after execution issued against the vendor; and that the purchase money did not go to the vendor, but by his direction to a daughter whom he claimed to owe, *held* sufficient to justify a finding of fraudulent intent in both parties.

ERROR from the district court for Holt county. Tried below before KINKAID, J. *Affirmed.*

*Jackson & Williams*, for plaintiff in error.

*R. R. Dickson*, *contra.*

POUND, C.

This is an action of replevin to recover certain cattle levied on by defendant on execution against plaintiff's vendor. The defendant claimed that the transfer was made in fraud of creditors, and the jury so found. Error is prosecuted by the plaintiff. It is claimed that the evidence fails to show a valid levy, and that the judgment, pursuant to which the execution issued, is void upon its face. The ground of the first contention is that the execution only was offered in evidence without offering the return also. But the petition alleges explicitly that defendant at the time suit was brought had possession by virtue of a levy under the execution, and there is ample evidence, adduced by plaintiff himself, that the levy was made, and made upon the cattle in dispute. The judgment on which the execution issued was rendered by the county court on the day at which the judgment debtor was to answer by the terms of an order allowing time for that purpose. Such premature rendition of the judgment was irregular and erroneous. *Rich v. Stretch*, 4 Neb., 186. But the irregularity should have been taken advantage of in the original cause. It was waived by not doing so. The time allowed to the judgment debtor to plead was for his benefit in that action. If he did not care to avail himself of it and attempt some defense in the county court or to prosecute error and correct the defect directly, he ought not

to be heard to complain in subsequent collateral proceedings. The judgment was merely erroneous. It is not open to collateral attack. *White v. Crow*, 110 U. S., 183; *Harper v. Biles*, 115 Pa. St., 594, 8 Atl. Rep., 446; *Mitchell v. Aten*, 37 Kan., 33, 14 Pac. Rep., 497; *Burt v. Scrantom*, 1 Cal., 416; *Altman v. School District*, 56 Pac. Rep. [Ore.], 291; *Righter v. Thornton*, 6 Ohio Dec., 7.

It is also argued that the verdict is contrary to the evidence and contrary to the instructions of the court. The evidence of fraud is wholly circumstantial. But that fraudulent intent in a transfer of property is a question of fact does not mean that such intent may not be proved by circumstances. It is often the case that no direct proof is available, and in most cases fraud is established by the circumstances. The court can not say, as a matter of law, that this or that circumstance is decisive of fraudulent intent. The question is not to be settled as one of law by artificial presumptions or badges of fraud. The rule goes no further. Its effect is that the inference or conclusion of fraud must be drawn from the circumstances as one of fact, by the triers of fact, and not by the court as an inference or conclusion of law. In the case at bar the cattle remained at all times in the possession of the vendor; no payment was made till long after the alleged date of the sale; the vendor was insolvent; there was no inspection of the cattle before purchase; the check given in payment was not presented for some time after the date it bears, and not till after execution issued against the vendor; and the consideration did not go to the vendor, but by his direction to a daughter, whom he claimed to owe. In view of all these circumstances, while the jury were not bound so to hold as a matter of law, they were amply justified in finding that the sale was a sham and pretense intended to defeat creditors and evade the execution. We see no reason to disturb their verdict.

It is recommended that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

State v. German Savings Bank.

STATE OF NEBRASKA V. GERMAN SAVINGS BANK OF OMAHA,  
APPELLEE, IMPLEADED WITH M. WOLLSTEIN ET AL.,  
APPELLANTS.

FILED MARCH 19, 1902. No. 12,484.

Commissioner's opinion. Department No. 2.

**Injunction.**

In the matter of the petition of Grant S. Cobb, and others, for an injunction against Thomas H. McCague, receiver of the German Savings Bank, R. W. Breckenridge, his attorney, and Joel W. West, attorney for the German Savings Bank.

ORIGINAL application in this court for an injunction in the main case, which is an APPEAL from the district court for Douglas county and was tried below before FAWCETT, J. *This opinion dissolves the injunction.*

*Brome & Burnett, V. O. Strickler and J. H. McIntosh,*  
for appellants.

*Greene, Breckenridge & Kinsler, contra.*

OLDHAM, C.

This matter was heard in our division on the application of the defendants to dissolve the temporary injunction issued by the chief justice on the 7th day of February, 1902. Answers were filed by the defendants, McCague, Breckenridge and West, in which they positively denied any intention of attempting to procure a hearing of the motion to review the orders of Hon. Jacob Fawcett, district judge, of July 8, 1901; the order of November 14, 1901, overruling motions of defendants filed July 13, and September 10, 1901, and the order of November 18, 1901, directing a compromise of certain stockholders; which motion appears to have been set for hearing before the Hon. Jacob Fawcett, district judge, on the 12th day of February, 1902.

Defendants positively deny any intention of attempting to have these orders reviewed pending the appeal of this cause in this court. In addition to this answer an affidavit was filed on the part of the Hon. Jacob Fawcett, district judge, in which he solemnly swears that before this injunction was allowed he had notified the attorney for the receiver, R. W. Breckenridge, that he would not hear the motions that he had previously set for hearing on the 12th day of February, 1902. He says that he served this notice on Breckenridge after this court had recalled the peremptory writ of mandamus in *State, ex rel. Cobb, v. Fawcett*, and ordered a rehearing of said cause. After this answer was filed and the evidence introduced, counsel for plaintiffs in the injunction suit conceded that in view of this showing there was no need of an injunction.

We therefore recommend that the temporary writ of injunction issued on February 7, 1902, be dissolved.

BARNES and POUND, CC., concur.

The temporary writ of injunction issued herein on February 7, 1902, is hereby dissolved, vacated and held for naught.

INJUNCTION DISSOLVED.

NOTE.—For final opinion in main case see 65 Neb., 416, 91 N. W. Rep., 414.—REPORTER.

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### CHARLES T. JENKINS V. ARTHUR MYATT.

FILED APRIL 2, 1903. No. 11,182.

Commissioner's opinion. Department No. 1.

**Pleading:** ANSWER FILED OUT OF TIME: STRIKING FROM FILES: PREJUDICE. Striking an answer from the files because filed out of time, where it was filed before the 3d Monday after fifty days from the judgment appealed from, is error without prejudice where defendant has no standing in court and no right to insist on any defense.

Jenkins v. Myatt.

ERROR from the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

*Chas. T. Jenkins*, for plaintiff in error.

*Geo. P. Sheesley* and *W. W. Stowell*, contra.

HASTINGS, C.

In this case the sole error urged is the sustaining of a motion to strike defendant's answer from the files because the same was filed out of time. This claim of error seems well founded. The case was tried in the county court of Butler county on November 12, 1898. It was appealed and appeal bond filed on November 16, and on December 15 a petition was filed on the appeal, and on January 11 defendant, Jenkins, filed a separate answer which was on the same day stricken from the files on motion of plaintiff because filed out of time.

Under the holding of *Beard v. Ringer*, 41 Neb., 831, the answer was in time. The fifty days from the trial in the lower court, in which plaintiff might file petition, did not expire until January 1. Only then was the defendant bound to look for it, and the time for filing answer began to run from that date. The answer, by section 1010a of the Code of Civil Procedure, is to be filed as in cases commenced in district court; that is, on or before the third Monday after the return day. This would be in this case the third Monday after January 1, and must have been later than the 11th. The answer, therefore, was in time, and the sustaining of the motion to strike erroneous.

It seems, however, that on the same day on which the answer was stricken from the files an order was made requiring defendant, Jenkins, to restore the money for which the wheat had been sold, which constituted the subject of the action. He had obtained this money, as was claimed, wrongfully, pending the appeal. This order was not complied with and the plaintiff filed a supplemental petition setting out the facts and defendant ten-

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dered an answer, which was refused, because he was in contempt in not obeying the order of the court; and he was denied any privilege of introducing testimony, but was allowed to appear and challenge plaintiff's evidence. His codefendant, moreover, was allowed to answer. If the action of the trial court in refusing to allow the defendant to appear and defend, except on condition of complying with the court's order, was right, then the striking of defendant's answer, because of filing on January 11, was error without prejudice. It surely can make no difference, if it was rightly stricken, whether the correct reason was assigned.

The result of the hearing was that plaintiff recovered judgment for right of property and one cent damages and the amount of money held by defendant for the wheat. The propriety of the court's action in making the order to restore as a condition to presenting the defense, and in refusing to modify it, is not questioned here. So long as that order stood unmodified there was no need of an answer, and that was the situation at the hearing.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and DAY, CC., concur.

AFFIRMED.

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THE ST. PAUL FIRE & MARINE INSURANCE COMPANY V.  
CHARLES A. KELLEY ET AL.

FILED APRIL 2, 1902. No. 11,279.

Commissioner's opinion. Department No. 1.

**Insurance: APPROVAL BY HOME OFFICE: PROPERTY DESTROYED BEFORE SUCH APPROVAL: LIABILITY.** Where a written application for insurance is made upon a blank form which provides that no liability shall attach until the application has been approved by the home office, and the application, together with the premium, is delivered to the agent of the company, and, before the application has been approved by the home office, the property insured is destroyed by the hazard insured against, *held* that the insurance company is not liable for loss occurring before such approval.

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ERROR from the district court for Furnas county.  
Tried below before NORRIS, J. *Reversed.*

*Lamberston & Hall* and *C. C. Marlay*, for plaintiff in error.

*W. S. Morlan, contra.*

DAY, C.

This action was commenced by William H. and Charles A. Kelley before a justice of the peace against the St. Paul Fire & Marine Insurance Company to recover for a loss by hail to growing grain owned by the plaintiffs. An appeal was taken to the district court for Furnas county, where upon trial the plaintiffs recovered a judgment for \$96.10, to review which the defendant has brought the case on error to this court.

The facts necessary to an understanding of the questions presented by the record are substantially as follows: On June 22, 1897, the plaintiffs made application to the defendant through its soliciting agent, one Sherwood, for insurance in the sum of \$300, upon growing crops of wheat and rye owned by plaintiffs, against loss or damage by hail. At the time of making the application the plaintiffs paid to Sherwood the sum of \$15 as premium, it being the amount he demanded. The application was upon one of the company's regular blanks, and so much thereof as is material to the present inquiry is as follows:

"I, C. A. Kelley and W. H. Kelley, of Cambridge post-office, in the county of Frontier, in the state of Nebraska, hereby make application to the St. Paul Fire & Marine Insurance Company for insurance upon growing grain against damage by hail only, for the season of 1897, to the amount of \$300 from the day this application is accepted and approved at the home office of the company at St. Paul at 12 o'clock noon, until September 15, 1897, at noon." And also a recital as follows: "That I know this application does not bind the company until received and approved at its general office in St. Paul, Minn."

This application, together with a money order for \$11.90, being the premium of \$15, less the agent's commission and cost of the money order, was forwarded to the defendant by Sherwood on June 23, 1897, and was received by the company on the 25th or 26th of June. In the due course of business, on June 28, the application was examined by the officers of the defendant company, and on that day it wrote a letter to the agent, Sherwood, and inclosed the application with the statement that the regular premium for such risks in Frontier county was six per cent. instead of five, and requested the agent to collect \$3 additional, the balance of the premium, and to make amendments in the application. This letter was received by Sherwood on June 30, and on the same day he remitted to the company the balance of the premium—whether the plaintiff paid this balance to the agent does not appear. In the letter transmitting the balance the agent says: "I was in error as to the rate, thinking it \$5." The loss occurred on the afternoon of June 28, 1897. On July 3 the application was approved by the company and a policy issued in favor of the plaintiffs, dated July 3, 1897, and expiring September 15, 1897. It appears that defendant was notified of the loss before it issued the policy, and in sending the policy to the plaintiffs it notified them that it was not liable for any losses prior to the issuance of the policy, and that if plaintiffs did not desire the policy the premium would be refunded.

The record is clear that Sherwood had no authority to make contracts of insurance for the company; his authority as agent was limited to the receiving of applications and the collection and receipting for premiums. It needs no argument to sustain the assertion that the application and the payment of the premium did not constitute a contract of insurance. It is perfectly clear that the application was understood and intended, merely, as an application for insurance to be perfected and to become operative by an acceptance and approval by the company.



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Until that was done there was no contract between the parties. The minds of the parties never met until the application had been received the second time and the full premium had been paid, and the application approved by the company, and this was on July 1, 1897, three days after the loss occurred. At the time of the loss there was, therefore, no contract between the parties, and hence nothing upon which a liability could be based.

In *Pickett v. German Fire Insurance Co.*, 18 Pac. Rep. [Kan.], 903, it is said: "Where a written application for insurance is made out on one of the regular blanks of an insurance company, which provides that no liability shall attach until the application has been approved by the home office, and the application, together with the premium, is delivered to the insurance agent, and, before the application has been approved by the home office, the property insured is destroyed by fire, held, that the insurance company is not liable for loss occurring before such approval." The same is held in *Walker v. The Farmers Insurance Co.*, 51 Ia., 679; *Armstrong v. State Insurance Co.*, 61 Ia., 212; *Atkinson v. Hawkeye Ins. Co.*, 71 Ia., 340.

The plaintiffs' theory of the case seems to rest upon the contention that the defendant owed some duty to them to either accept or reject the application immediately upon its receipt at the home office on June 25 or 26, and as the company did not signify its rejection of the risk, the conclusive presumption would obtain that it was approved and accepted upon that date. We can not consent to this proposition. The mere fact that an application for insurance had been made and a long time elapsed and no acceptance or rejection of the risk had been signified by the company, does not warrant the presumption of its acceptance. There must be an actual acceptance or there is no contract. These views find support in *Haskin v. Agricultural Fire Insurance Co.*, 78 Va., 700; *Insurance Co. v. Johnson*, 23 Pa. St., 72.

We think the learned district judge erred in entering



judgment in favor of the plaintiffs and recommend that the judgment be reversed.

HASTINGS and KIRKPATRICK, CO., concur.

REVERSED AND REMANDED.

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JAMES W. MCCARTHY ET AL. V. MARY BIRMINGHAM, EXECUTRIX OF THE ESTATE OF MARY BARRY, DECEASED.

FILED APRIL 2, 1902. No. 11,319.

Commissioner's opinion. Department No. 2.

1. Ejectment: TITLE FROM COMMON SOURCE: EVIDENCE. Where title is derived from a common source, plaintiff in an action of ejectment need only show title from this common source to enable him to recover on the strength of his own title.
2. Ejectment: INSTRUCTIONS. Instructions examined, and held properly given.

ERROR from the district court for Douglas county. Tried below before FAWCETT, J. *Affirmed.*

George W. Covell and J. J. O'Connor, for plaintiffs in error.

A. L. Knabe, contra.

OLDHAM, C.

This was an action in ejectment for the recovery of a city lot situated in the city of Omaha, Nebraska. The answer was a general denial and a plea of the statute of limitations. There was judgment for the plaintiff in the court below and the defendants bring error to this court.

The evidence shows that the lot in controversy was conveyed by warranty deed from Thina Shankey and husband to the plaintiff, Mary Barry, in September, 1884; that after the purchase of the property plaintiff took possession of and resided on the premises with her three

daughters, one of whom is the defendant, Annie McCarthy. Defendants asserted title and a right of possession to the premises under an alleged verbal contract between Annie McCarthy and her mother, the plaintiff, by the terms of which it is claimed that the plaintiff agreed that if Annie McCarthy would make certain repairs on the premises and pay the taxes, pay off a mortgage on the property and support the plaintiff the rest of her natural life, then plaintiff would deed the property to defendant, Annie McCarthy. It was claimed by defendants that this agreement was entered into in the year 1887, before the marriage of Annie McCarthy to the defendant, James McCarthy, and while Annie McCarthy was living in the premises with her mother, the plaintiff. There was a direct conflict of testimony as to the existence of this contract, and consequently there is no reason for disturbing the verdict of the jury in finding this issue against the contention of the defendants.

Defendants urge in their brief that plaintiff's evidence is not sufficient to support the judgment, because she failed to trace her chain of title to a grant from the United States government. But, under the issues involved in this controversy, this was not necessary; for defendants asserted a title and a right of possession bottomed on a contract alleged to have been made by one of them with the plaintiff, and hence they all claim title from a common source, and it is a well established rule in actions in ejectment that where title is derived from a common source plaintiff need only prove title from this common source. Newell, Ejectment, section 9, page 379; *Barton v. Erickson*, 14 Neb., 164.

Defendants have assailed the fifth paragraph of instructions given by the trial court on its own motion, which is as follows: "By a preponderance of evidence is meant, not necessarily the greater number of witnesses who testify to a particular fact or state of facts, but it is that evidence which, taken altogether, satisfies you of its truth." No attempt is made to point out any

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possible prejudice that could have resulted to defendants by the giving of this instruction, nor did they request any other instruction on the question of the weight of evidence from the trial judge. They have, however, presented the draft of an instruction on this question in their brief, which they contend would have been an improvement on the one above set out, but, as the trial judge was not given an opportunity to pass on the merits of the instruction set out in their brief, we shall decline to compare its merits with the merits of the charge given by the trial court. The attack on the verbiage of certain clauses in the sixth, seventh, and eighth paragraphs of instructions is too fastidious and hypercritical to require comment. The tenth paragraph is assailed because it told the jury that both plaintiff and defendants claimed title from a common source, but, as before set out in this opinion, this instruction was proper under the evidence introduced in the case.

We have examined the transcript of the evidence and find no prejudicial error to have been committed by the trial court either in the admission or exclusion of testimony, and we therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

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THE CITY OF OMAHA V. EZRA S. DOTY.

FILED APRIL 2, 1902. No. 11,346.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error:** VERDICT SUPPORTED BY EVIDENCE. This court will not interfere with the verdict of a jury unless it is clearly unsupported by the evidence.
2. **Damages:** PETITION SUPPORTED BY EVIDENCE. Allegations of the petition *held* to be supported by the evidence.

ERROR from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*



*W. J. Connell*, for plaintiff in error.

*I. J. Dunn*, *contra*.

DUFFIE, C.

The defendant in error was an employee of the Omaha Street Railway Company. On August 16, 1895, after his work for the day was over, and while a passenger upon one of the cars of the street railway company, he met with the accident of which complaint is made. In his petition he alleges that at the date aforesaid "the city of Omaha, through its agents and employees, was repairing Sherman avenue by paving the same; that on said day, the plaintiff, while a passenger on one of the open cars of the Omaha Street Railway Company, operated upon said line of railway tracks, and at the intersection of Sherwood street and Sherman avenue in said city, while standing on the footboard of the street car, while the car was in motion, and while about to alight from the car, his right leg came in contact with a heavy oil-barrel partly filled with water, which the said city, through its agents and employees, had knowingly and intentionally and negligently left standing so near the car tracks of the said Omaha Street Railway Company as to render travel along said street upon the street cars dangerous, \* \* \* and that the accident of which he complained was due to the negligence of the defendant in leaving said dangerous obstruction in the street unguarded and without any signals to indicate that there was an obstruction." A trial resulted in a verdict for the plaintiff below, upon which the court entered judgment.

The plaintiff in error does not complain of the instructions of the court or of any error in the admission or the refusal to admit evidence. The sole questions presented are the alleged failure in the proof to show that the accident occurred in the precise manner in which it is set out in the petition and that the verdict is not supported by the evidence. We have carefully examined the

record and do not think that we can interfere with the judgment entered. The claim made by the plaintiff in error that the proof demonstrates that the defendant in error was injured in getting off the car while the same was in motion, and on a street which he knew was being repaired and in a dangerous condition, is not made so clear and apparent as to require us to interfere with the finding of the jury. Mr. Doty testifies: "I was standing in about this shape, stepped down on the foot-board, had hold of the hand hold on the side of the car, and stepped down and had no more than stepped down when I struck the barrel." In reply to an inquiry as to whether his right foot was on the foot-board at the time of coming in contact with the barrel, he said: "Well, I could not say whether all of my foot was or not; probably not; my left foot was."

The plaintiff in error gives some figures compiled from the evidence to show that the height of the barrel was 34 inches, that the rail of the street car company was from 6 to 10½ inches above the ground on which the barrel stood, that from top of rail to foot-board was from 16 to 18 inches, and from foot-board to the point on the leg where it was bruised or injured was from 17 to 18 inches, making a total distance from the ground to the bruises on plaintiff's leg from 39 to 46½ inches, and from this it is argued that it was impossible that he could have been injured at the place on his leg where the bruise appeared if he had been standing on the foot-board. Thousands of instances are known and have been remarked on where accidents have happened in a manner which is wholly unaccountable and unexplainable and without fault of the injured party. That the injury was inflicted on the leg, at a point which would be some inches above the top of the barrel, if the party was standing in an upright position on the foot-board of the car, is not, in our opinion, a circumstance sufficient to call for a reversal of the case. We do not think that there was any fatal variance between the pleadings and the proof, even though it be conceded

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that the plaintiff below did not have both feet on the foot-board when the accident occurred. If he had his left foot only on the foot-board of the car, and the right hanging outside and below the foot-board, he would still be standing on the foot-board, in the common acceptance and understanding of that term. The plaintiff's leg was broken by the accident; he was unable to work for some months; his medical attendance cost him \$130. We can not say that the verdict was excessive. The case was apparently tried with great care by the district court, the rights of the plaintiff in error being fully protected in the introduction of evidence and the charge to the jury. We have discovered no reversible error in the record, and recommend that the judgment be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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THE KINGMAN IMPLEMENT COMPANY V. CHARLES B. STRONG.

FILED APRIL 2, 1902. No. 11,353.

Commissioner's opinion. Department No. 2.

1. **Replevin: PLAINTIFF WITHOUT INTEREST: PRESUMPTION OF VALUE OF DEFENDANT'S RIGHT.** In a replevin action brought to this court on error, where there is a total failure of evidence to show that plaintiff had any interest in the property, it will be presumed that the value of the defendant's right to the possession of the property is the same as its value, found by the verdict of the jury.
2. **Trial: TIME FOR OBJECTING TO VERDICT: WAIVER.** Objections to the form of a verdict must be made when it is rendered, and before the jury is discharged. Objections not made and exceptions not taken to it until a motion for a new trial is filed will be deemed to have been waived.

ERROR from the district court for Johnson county.  
Tried below before STULL, J. *Affirmed.*

*L. C. Chapman*, for plaintiff in error.

*Wilson & Brown* and *M. B. C. True*, *contra.*

**BARNES, C.**

This was an action in replevin, tried in the district court for Johnson county. The plaintiff in the court below filed the ordinary petition in replevin, claiming absolute ownership and the right to the immediate possession of the property in question. The answer, as it stood at the time of the trial, was a general denial. On these issues the cause was tried and the jury returned the following verdict (omitting title): "We, the jury, being impaneled and sworn in the above entitled cause, do find that at the commencement of this action the right of possession was in the defendant. We find the value of the property at the sum of \$385, and assess the amount of his damages at the sum of one cent." Judgment was entered upon this verdict as follows: "It is therefore considered, ordered and adjudged that the defendant have and recover of and from the plaintiff the property in question herein, or in case a return of the same can not be had, that he recover of and from said plaintiff the sum of \$385, the value of the said property, and his damages sustained by reason of the unlawful detention of said property the sum of one cent, as heretofore by the verdict of the jury herein found; and his costs in this behalf expended, taxed at \$——." A motion for a new trial having been overruled, plaintiff brings the case to this court on a petition in error. There is no bill of exceptions in the record.

1. The only error complained of and argued in the plaintiff's brief is that the judgment of the court based on the verdict is erroneous; that the verdict is not sufficient in form and will not support the judgment of the court. It is urged that inasmuch as the verdict did not state the value of the defendant's right of possession, no judgment could be entered thereon. There was a total failure of evidence to show that the plaintiff had any interest in the property. The plaintiff claimed to be the general owner of the property and entitled to the immediate possession of it; the defendant having denied all



the allegations of the petition, the plaintiff having failed to prove his ownership or right to the possession of the property, and there being nothing in the pleadings and no evidence in the record to the contrary, it will be presumed that the value of the defendant's right of possession was the same as the value of the property, and the error, if any, was without prejudice.

2. No objection was made to the form of the verdict at the time the jury returned it into court, and the plaintiff in error will be deemed to have waived all exceptions thereto. *Armstrong v. Lynch*, 29 Neb., 87; *Brumback v. German National Bank of Beatrice*, 46 Neb., 540; *Cervena v. Thurston*, 59 Neb., 343; *Richardson Drug Co. v. Teasdall*, 59 Neb., at page 156. Objections to the verdict, if any there were, should have been made at the time it was rendered, and while the jury were still in court, in order that it might be properly corrected before they were discharged. This was not done, and there was nothing left for the court to do but to render its judgment, as it did, upon the verdict.

If there was any error in this, the plaintiff was not in a position to take advantage of it. We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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IRA G. WESTERVELT ET AL., APPELLEES, V. AUGUST F. FILTER  
ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,424.

Commissioner's opinion. Department No. 2.

1. **Limitation of Actions: FRAUDULENT CONVEYANCES: WANT OF KNOWLEDGE: PLEADING.** When an action is brought to set aside a fraudulent conveyance more than four years after the date of the conveyance, it is incumbent on the plaintiff to show himself within the exception that gives additional time on account of the want of knowledge of the transaction, by stringent rules of pleading and evidence.

2. **Limitation of Actions: PLEADING TOLL OF THE STATUTE.** The same stringent rule of pleading and proof is required to toll the statute for want of capacity to bring the action as is required to toll it for want of knowledge of the fraud.
3. **Creditors' Suit: SUFFICIENCY OF EVIDENCE.** Evidence examined, and held not sufficient to sustain the judgment.

APPEAL from the district court for Pierce county.  
Tried below before ALLEN, J. *Reversed.*

*Joseph Wurzburg and E. J. Clements, for appellants.*

*Robertson & Wigton, contra.*

OLDHAM, C.

This was an action, in the nature of a creditors' bill, instituted by the plaintiffs to charge certain lands situated in Pierce county, Nebraska, with the payment of a judgment obtained by the plaintiffs against the defendant, August F. Filter, in the district court for Madison county, Nebraska, on the 25th day of April, 1898.

The petition alleges the procuring of the judgment by the plaintiffs against defendant, August F. Filter, in the district court for Madison county; the filing of a transcript of such judgment in the office of the clerk of the district court for Pierce county, Nebraska; the issue and return *nulla bona* of an execution on said judgment, and the insolvency of August F. Filter. It then alleges that on the 9th day of December, 1890, defendant, August F. Filter, conveyed the lands described in the petition to his daughter, Martha Filter, without consideration and for the purpose of hindering, delaying and defrauding the plaintiffs and other creditors; and that on the same day the said Martha Filter, without consideration, and for the same fraudulent purpose, conveyed the lands by deed of warranty to Caroline Filter, mother of Martha Filter and wife of August F. Filter, and that on the 14th day of January, 1898, Caroline Filter and August F. Filter conveyed a part of these lands to defendant, Christian Filter, and the remainder of them to defendant, Rainbolt J. Filter.

All these conveyances are alleged to have been made without consideration and for the purpose of hindering, delaying and defrauding the creditors of August F. Filter. The petition then alleges that the judgment (which is sought to be charged as a lien on these lands) was obtained "in an action by the plaintiffs against the defendant, August F. Filter, and others, for contribution by reason of the following facts, namely, on the 20th day of August, 1890, The North Nebraska Fair & Driving Park Association executed and delivered to Henry Schomberg a promissory note for the sum of \$5,000 and on the same day plaintiffs and the defendant, August F. Filter, with others, jointly indorsed and guaranteed the payment of the said note. The said association did not pay said note when the same became due and payable, and the said indorsees and guarantors became liable to pay the same. Thereupon these plaintiffs were compelled to, and did, pay said note, and by reason of such payment these plaintiffs recovered said judgment, against said defendant, August F. Filter, for contribution." The petition prays that all these conveyances be canceled and declared null and void and that the premises, or so much thereof as may be necessary, may be ordered sold and the proceeds thereof applied to the satisfaction of plaintiff's judgment. This petition was dismissed as to the defendant, Martha Filter. Defendants, Christian Filter and Rainbolt Filter, filed separate answers alleging the *bona fides* of their purchases from Caroline Filter, and they also pleaded the statute of limitations. Defendant, August F. Filter, and Caroline Filter, filed general denials and pleaded the statute of limitations, and August F. Filter also pleaded a discharge in bankruptcy by the district court of the United States on the 7th day of June, 1899. Plaintiffs replied to these answers with a general denial.

The plaintiffs, to sustain the issues in this case, introduced in evidence at the trial of the cause the record of the proceedings and judgment of the district court for Madison county, Nebraska, which were had and ren-

dered on the 25th day of April, 1898, in favor of the plaintiffs and against the defendant, August F. Filter. They also introduced the transcript of the judgment which was filed in the office of the clerk of the district court for Pierce county, the execution issued on said judgment and its return *nulla bona* by the sheriff of Pierce county. Plaintiffs then proved that defendant, August F. Filter, indorsed the note for \$5,000 given by The North Nebraska Fair & Driving Park Association to Henry Schomberg in September, 1890, and before he transferred the real estate in controversy to Martha Filter. It was admitted that August F. Filter and Caroline Filter were husband and wife, and that Christian Filter and Rainbolt Filter were sons, and that Martha Filter was the daughter of August and Caroline Filter. Defendants offered no testimony except the alleged discharge of August F. Filter in bankruptcy by the United States district court of Nebraska on the 17th day of June, 1899. On this evidence the court below found the issues in favor of the plaintiffs and entered a decree cancelling the various conveyances, and directed the sale of the lands in dispute for the satisfaction of plaintiffs' judgment, and the defendants have prosecuted their appeal to this court.

The question then arises whether, under the allegations contained in plaintiffs' petition and the proof offered in support thereof, this judgment can be sustained? It will be observed that the first conveyance alleged against was made by defendant, August F. Filter, through his daughter, Martha Filter, to his wife, Caroline Filter, in December, 1890, and almost eight years before this cause of action was instituted. It is also apparent that there is no allegation in plaintiffs' petition sufficient to toll the statute of limitations against the alleged fraudulent conveyance because of the want of knowledge of it; nor was there any evidence introduced tending to show any concealment of this conveyance from the plaintiffs. Section 12 of the Code of Civil Procedure provides the following limitations on actions: "Within four years, an action for trespass

upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud."

It has been held by a long and unbroken line of decisions of this court that where an action is brought for relief on the ground of fraud, after the lapse of four years from the date of the fraudulent transaction, the plaintiffs must allege and prove diligence in making inquiry, and that they have instituted their cause of action within four years of the time the fraud was actually discovered. *Parker v. Kuhn*, 21 Neb., 413; *Wright v. Davis*, 28 Neb., 479; *Gillespie v. Cooper*, 36 Neb., 775; *Horbach v. Marsh*, 37 Neb., 22; *Forsyth v. Easterday*, 63 Neb., 887, 89 N. W. Rep., 407. In all cases in which it is attempted to bring an action to set aside a fraudulent conveyance after the apparent bar of the statute it is incumbent upon the plaintiff to show himself within the exception that gives additional time by stringent rules of pleading and evidence. Wait, *Fraudulent Conveyances and Creditors' Bills* [3d ed.], section 149; *Wood v. Carpenter*, 101 U. S., at page 140, and cases above cited. It is then apparent that there is nothing either in the pleading or proof offered by plaintiff to toll the statute against the conveyances of December, 1890, because of concealment or want of knowledge on their part of any alleged secret trust created by such conveyances.

We next turn to the allegations of the petition to see if any averment is made that shows that plaintiffs instituted this suit with due diligence as soon as their right of action for contribution had accrued against the defendant. The same stringent rule of pleading and proof is required to toll the statute for want of capacity to bring the action as is required to toll it for want of knowledge of the fraud. *Brown v. Brown*, 11 S. W. Rep. [Ky.], 4.

We gather from the petition and from some apparent admissions in the answer of the defendant, August F. Filter, that defendant, August F. Filter, and plaintiffs and others indorsed and guaranteed the payment of a note for \$5,000 given by The North Nebraska Fair & Driving Park Association to Henry Schomberg in August, 1890; but there is no allegation in the petition and no proof offered as to when this note matured, and the liability of the indorsers and guarantors became absolute. It is alleged in the petition that suit was brought on this note and a judgment procured against plaintiffs and defendant, August Filter, and others on the 27th day of March, 1895. It is also proven by the records of the district court for Madison county that plaintiffs procured their judgment for contribution against the defendant on the 25th day of April, 1898. But it is not alleged that this suit was brought as soon as the note became due. Now the question is, is this sufficient to show that plaintiffs prosecuted this suit with diligence as soon as their right of action accrued against defendant? We think not. As soon as the \$5,000 note, which these parties had indorsed, became due plaintiffs had a right to pay the note and bring their action for contribution against their co-sureties. They also had a right to proceed by attachment against the alleged fraudulent alienation of these lands without waiting to reduce their claim to judgment and instituting a suit in the nature of a creditors' bill. *Gillespie v. Cooper, supra; Brown v. Brown, supra.* It then follows that there is no sufficient allegation made or proof offered by plaintiffs to show diligence in the prosecution of this action against the conveyances made by August Filter of the premises in dispute in the year 1890.

The next question then is, is there anything in the evidence offered by plaintiffs to show that the conveyances made by Caroline Filter and her husband to her two sons in the year 1898 were made for the benefit of August Filter in furtherance of the fraudulent schemes by which these lands were conveyed to Caroline Filter in the year 1890?

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We look in vain through the abbreviated bill of exceptions attached to the transcript in this case for a scintilla of evidence to connect August F. Filter with this transaction, except the mere fact that he signed the deed as the husband of Caroline Filter. There is no evidence offered tending to show that August Filter had ever been in possession of the lands in dispute or that he had ever exercised any acts of ownership or control over them since they were deeded to his wife in 1890. There is no testimony offered tending to show how much property August Filter owned at the time he made the transfer of these lands in 1890; nor is there any evidence showing his insolvency prior to 1898. In fact, as set out in the statement of this case, plaintiffs introduced no testimony at all except as to the time that August Filter indorsed the note, the record of plaintiffs' judgment against Filter, the transcript of the judgment, the return of the execution on the judgment and the admission of the relationship between the defendants.

If this suit had been instituted within four years of the discovery of the conveyances to Caroline Filter in 1890, the admission of the relationship between her and August Filter, coupled with proof of August Filter's insolvency, would have been sufficient in the absence of any other showing to have warranted the court in setting aside these conveyances as having been made in fraud of the rights of August Filter's creditors. But the presumption arising from the near relationship between these parties is not sufficient to toll the statute of limitations beyond the period of four years, nor is it sufficient to warrant the court in cancelling the conveyances made by Caroline Filter to her two sons in 1898, she not being indebted to any of these plaintiffs. No evidence having been introduced by plaintiffs tending to show that the conveyances made by Caroline Filter to her two sons in 1898 were made in trust for the benefit of August F. Filter, we are of the opinion that the evidence is not sufficient to support the judgment.

The defense based on the discharge of August F. Filter in bankruptcy was abandoned by his counsel at the oral

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argument of this cause, and for that reason it has not been considered in this opinion.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.

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THE REAL ESTATE TRUST COMPANY OF PHILADELPHIA ET AL., APPELLEES, V. SUSANNAH FAWELL ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,431.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure and Sale.

APPEAL from the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

*Abbott & Lane*, for appellants.

*S. L. Geisthardt*, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale under a decree of foreclosure. No questions are presented by the record which have not been heretofore determined by this court, and we therefore recommend the affirmance of the order appealed from.

ALBERT and AMES, CC., concur.

AFFIRMED.



CHARLES SELLECK V. EDWARD FEENEY ET AL.

FILED APRIL 2, 1902. No. 11,444.

Commissioner's opinion. Department No. 1.

1. **Forcible Entry and Detainer: APPEAL PRIOR TO 1901.** Prior to 1901 there was in this state no valid statute authorizing an appeal from the judgment of a justice of the peace in an action for the forcible entry and detention, or forcible detention only, of real property.
2. **Forcible Entry and Detention: JURISDICTION: CONSENT OF PARTIES.** The jurisdiction of the district court in such action, being derivative only, is not aided by consent of parties. *Ettenheimer v. Wallman*, 63 Neb., 647, 88 N. W. Rep., 859, followed.

**ERROR** from the district court for Douglas county. Tried below before SCOTT, J. *Reversed and appeal stricken.*

*James H. Van Dusen*, for plaintiff in error.

*A. L. Sutton and E. R. Leigh*, contra.

DAY, C.

On May 19, 1898, in an action of forcible entry and detainer, Charles Selleck obtained a judgment for restitution before a justice of the peace against Edward Feeney and others. From this judgment the defendants appealed to the district court for Douglas county, conforming to the requirements of section 1030 of the Code of Civil Procedure as amended in 1883. Upon the trial in the district court the jury, in obedience to a peremptory instruction, returned a verdict for the defendants, upon which judgment was rendered. To review this judgment the plaintiff has brought error to this court.

Since the judgment of the district court was rendered this court has held that the statute above referred to, authorizing an appeal in this class of cases, is unconstitutional. *Armstrong v. Mayer*, 60 Neb., 423; *State v. Fields*, 62 Neb., 520, 87 N. W. Rep., 318; *Ettenheimer v. Wallman*, 63 Neb., 647, 88 N. W. Rep., 859. "The juris-

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diction of the district court in actions of forcible entry and detention, or forcible detention only, of real property, being derivative, and not original, the second trial and judgment, notwithstanding the fact that the parties voluntarily appeared, were unauthorized and void." The attempted appeal, therefore, conferred no jurisdiction of the cause upon the district court and its judgment was void. We therefore recommend that the judgment of the district court be reversed and the appeal stricken from the docket.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND APPEAL SO STRICKEN.

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JOSEPH A. CONNOR V. J. P. RUMSEY ET AL.

FILED APRIL 2, 1902. No. 11,494.

Commissioner's opinion. Department No. 1.

**Bills and Notes: CONSIDERATION: GAMING: EVIDENCE.** Evidence examined, and *held* sufficient to sustain finding of jury that the consideration of the note sued upon was not tainted with any indebtedness arising out of gambling transactions.

ERROR from the district court for Douglas county. Tried below before SLABAUGH, J. *Affirmed.*

*James H. Van Dusen*, for plaintiff in error.

*Montgomery & Hall*, *contra.*

HASTINGS, C.

The only question raised in this case is as to whether or not the evidence conclusively shows that the consideration of the note sued upon was in part at least a wagering contract in grain futures, and the note therefore void and uncollectible. The trial court instructed the jury that if any part of the consideration of the note sued upon was a mere wagering contract for future sale and delivery of

grain, and no intention existed on the part of any one concerned to actually deliver the grain, but the intention was to settle by payment of the difference either way between the agreed price and the market price on the agreed date of delivery, they should find for the defendant, the plaintiff in error here. The verdict was for the plaintiff below, notwithstanding this instruction and another one that the burden of proof was on the plaintiff to show that no part of the consideration of the note arose out of gambling transactions. It is now claimed that the proof conclusively shows that a portion of the consideration of the note were losses incurred by defendant on such gambling contracts, and the verdict was therefore contrary to instructions.

At the trial no instruction for a verdict for defendant was asked. On the contrary it appears that by instruction No. 2, submitted by defendant, the jury were expressly asked to pass upon the question as to whether such gambling transactions formed a part of the consideration of the note. This instruction, to be sure, was refused by the court, but only to give the more favorable one that the burden was on the plaintiff to show that it was not. The question as to gambling transactions was, then, submitted at defendant's request, and more favorably to him than he had requested. Under the holding in *Farmer's Bank of Nebraska City v. Garrow*, 63 Neb., 64, 88 N. W. Rep., 131, he can not now complain that there was no question to be passed upon by the jury under the evidence. Perhaps this doctrine is not applicable quite as broadly to instructions tendered by a defendant as it would seem from the general expressions used in the case cited. Possibly, its application should be confined to the party at whose instance and for whose benefit a question is submitted, and should not be applied to one who is merely defending and denying and who tenders an instruction relating to a question merely because he finds it is to be submitted at the other party's instance. This is as far as some of the cases cited in *Bank v. Garrow* go, though

the case itself seems to hold that asking an instruction in reference to an issue is equivalent to an estoppel against all claim that there was no evidence sufficient to uphold an adverse finding upon it.

It is not necessary, however, to resort to this principle in order to sustain the verdict against this complaint. The evidence disclosed that the note sued upon was given as a renewal for a previous one for the same amount given six months earlier. It showed the indebtedness of defendant to plaintiff arose upon two accounts. One was overdrafts by defendant against grain shipments, and one was by losses on "options" in grain, both of sale and purchase, secured by defendant through plaintiffs on the Chicago board of trade. Defendant claimed that a part of the consideration of this note were losses in the latter operations, and plaintiff, that the consideration of this note was the one renewed and that such first note was wholly for overdrafts against grain shipped. Plaintiff's evidence tended to support this contention and to show that when the original note was given the option account showed a net profit to defendant and no indebtedness on this account could have been included in it.

The evidence is somewhat conflicting, but we are by no means prepared to say that the jury did not obey even the instruction to find for defendant, unless the plaintiff's evidence that there was no gambling taint in the note should preponderate.

It is recommended that the judgment of the trial court be affirmed.

KIRKPATRICK and DAY, CC., concur.

**AFFIRMED.**

FRANK B. KENNARD V. HENRY J. GROSSMAN.

FILED APRIL 2, 1902. No. 11,509.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: ASSIGNMENTS CONSIDERED.** In proceedings in error only such grounds as are assigned in the petition in error will be considered.
2. **Appeal and Error: INSTRUCTION REFUSED TO PARTY BUT GIVEN BY COURT.** Where a party to a suit requests the submission of a question to the jury by the tender of an instruction which is refused, he can not complain of an instruction, given by the court on its own motion, submitting the same question.
3. **Appeal and Error: INSTRUCTION GIVEN BY COURT REFUSED TO PARTY**  
It is not error to refuse to give an instruction tendered, when the ground covered thereby is covered by instructions given by the court on its own motion.

**ERROR** from the district court for Douglas county.  
Tried below before **KEYSOR, J.** *Affirmed.*

*I. R. Andrews, for plaintiff in error.*

*T. J. Mahoney and J. A. C. Kennedy, contra.*

**ALBERT, C.**

The plaintiff in this court was the defendant, and the defendant here was the plaintiff in the district court. They will be referred to hereafter by the title in the court below.

The plaintiff was in the employ of the defendant and, in the course of his employment, was engaged in carrying large pieces of glass from one part of defendant's store-room to another. While he was thus carrying a large piece of glass it was brought in contact with some obstruction in the passageway and broken. By the pieces of broken glass the plaintiff was seriously cut about the arm, wrist and hand, and is alleged to have received thereby serious and permanent injuries. He brought this action against the defendant to recover for said injuries,

and alleged that they resulted from the negligence of the defendant in permitting the passageway, where the injury occurred, to become obstructed. The defendant entered a general denial and alleged contributory negligence. It was conclusively established, on the trial, that the plaintiff was, to some extent, foreman of the store-room where the accident occurred, and to a certain extent had control of the employees therein, and that the obstructions which caused the injury were boxes of merchandise that had been placed in the passage by the other employees of the defendant. The plaintiff, however, insists that at the time those obstructions were placed in the passageway and when the injury occurred the employees were acting under the immediate direction of the defendant, who at the time had personal control and supervision of the store-room and the employees. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant brings the case here on error.

The defendant insists that the verdict is not sustained by sufficient evidence, and that the court erred in its refusal to direct a verdict in his favor. Whatever merit there may be in the argument on these points we are precluded from inquiring into them, for the reason that they are not assigned in the petition in error. The rule that only such errors as are assigned and argued will be considered is too well settled to require the citation of authorities.

It is next insisted that the court erred in giving instructions Nos. 2 and 3, which are as follows:

"2. You are instructed that it is the duty of an employer to exercise reasonable and ordinary care in furnishing his employees a reasonably safe place in which to work; and so it was the duty of the defendant to exercise reasonable care and prudence in providing a reasonably safe passageway for the plaintiff to use in carrying glass in the performance of his work; and if you believe from a preponderance of the evidence that the defendant did not exercise ordinary care in furnishing a passageway free from ob-

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structions for the use of the plaintiff and that such want of care was the direct cause of the injury complained of, then defendant is liable in this case and you should so find; unless you further find from the evidence that plaintiff assumed the risk of the injury suffered, or was himself guilty of negligence which contributed in some degree to the happening of said injury.

"3. The undisputed evidence proves that plaintiff was defendant's foreman, and that as such he had charge of the truckmen at work in said room, and had supervision of the deposit of boxes in said store-room. It was then the duty of plaintiff to superintend the arrangement of said boxes of glass, and if he did not do so, or did not do so properly, then the plaintiff can not recover, unless it appear from the preponderance of the evidence that defendant himself gave the truckmen orders and for the time being superseded the plaintiff as foreman in the control of the truckmen and the deposit of the boxes in question."

The only objection urged against these instructions is that they submitted to the jury the question of the plaintiff's contributory negligence, which, the defendant insists, was conclusively established by the evidence, and, consequently, that there was no evidence upon which to submit such question to the jury. The contributory negligence relied upon by the defendant, as we gather from the argument, was that the plaintiff was foreman of the store-room and had charge and supervision of the storing of the boxes of merchandise, and control of the workmen engaged in that work. But, as we have seen, the plaintiff's theory of the case was that at the particular time when the obstructions were being placed and the plaintiff received the injuries in question the defendant himself had assumed control of the store-room and the direction of the workmen, and that in placing the obstructions the workmen were acting under his immediate orders. We must assume that there was some evidence to support this theory, because the defendant, by two different instructions tendered by him, asked the submission of that question to the

jury. He can not now be heard to say that the instructions submitting the same questions were not based on sufficient evidence.

It is next urged that the court erred in refusing to give instructions Nos. 1, 4, 5, 6 and 11, asked by the defendant. These instructions are as follows:

"1. The testimony is undisputed that the plaintiff had charge of the wareroom in which said accident occurred and of the unloading and depositing the merchandise brought into said building, as well as the direction and control of the employees whose duty it was to truck said goods, including all glass therein. If, therefore, you find from the evidence that the said injury was caused by the passageway being obstructed by the employees trucking goods therein, your verdict will be for the defendant, unless you find that the defendant personally directed the obstruction of said passageway. And the court further instructs you that an order given by the defendant to pile said goods in the north end of the store was not an order to obstruct a permanent passageway therein."

"4. You are further instructed that the foreman and plaintiff in this case, not only assumed all the ordinary risks of the work he was personally doing, but he also assumed all the risk occasioned by the carelessness of the employees subject to his control and over whom he was superintendent while in the performance of their work; and it is therefore the duty of the said plaintiff to see that those under his control and direction properly performed their work, and if, owing to the carelessness of the said employees under said plaintiff's control in performing their work, said plaintiff was injured, then the plaintiff can not recover and your verdict must be for the defendant.

"5. You are further instructed that the said plaintiff assumed all the ordinary risks of his employment, and in addition thereto all risk which he had an equal facility for ascertaining the danger incident thereto as the defendant. If, therefore, you find that the obstruction of said passage-



way was owing to the negligence of said defendant, and you also find that the said plaintiff had equal facilities for ascertaining the danger incident to carrying said glass through said passageway, as his employer had, then he will be held to assume the risk of said glass coming in contact with the obstruction, and your verdict will be for the defendant.

"6. Evidence has been given that one of the witnesses, Mr. Werring, testified that the defendant in this case told him not to pile any more goods in the south part of the building, but to pile them in the north thereof.

"It is further admitted in evidence that the aisle in which the plaintiff was hurt was a regular aisle which had been in continuous use for a long time. The court therefore instructs you that the order on the part of the defendant to said Werring not to pile the goods brought in the store in the north end, but to pile the goods in the back part of the store was not a direction to pile them in this aisle in which plaintiff was injured, unless you further find from a preponderance of the evidence that there was no other place in the north part of the store to pile said goods."

"11. You are instructed that the plaintiff in carrying said glass was to use reasonable care and caution while so doing, which means that he must look the direction he is going in order to avoid obstructions, whether to his feet or any other portion of his person, or the object or thing he was carrying, and if you find from the evidence that he could, by looking, have discovered the obstruction which caused the accident then the plaintiff can not recover."

The following instructions were given by the court on its own motion:

"It is claimed by the plaintiff in his evidence that said passageway was obstructed by order of the plaintiff. You will take into consideration whatever order the testimony shows the defendant gave in that regard, and you will then determine from the testimony whether or not said

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order required the deposit of boxes of glass in said passageway; and if you find that defendant gave an order to his employees as to the deposit of boxes of glass, and that said order did not direct the deposit of said boxes in said passageway, then your verdict should be for the defendant; but if you find that the order alleged to have been given by the defendant required the deposit of said boxes of glass in said passage, or left it open to the employees in the reasonable discharge of their duty under said order, to place them in said passageway, and that the placing of the boxes there caused said injury, then defendant is liable in this case, unless the plaintiff assumed the risk or was guilty of negligence which contributed to said injury."

"5. It is the duty of an employee to exercise ordinary and reasonable care in the protection of himself in the performance of his work; and if he do not do so, and his want of care contributes in any degree, however slight, to an injury to himself, then he is guilty of contributory negligence and can not recover damages from his employer, even though the employer were negligent. If you find from a preponderance of the evidence that plaintiff, in carrying said glass the way he did, and in said passageway, did not exercise what was reasonable prudence and care under all the circumstances, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant.

"6. It is the law that an employee assumes all the ordinary risks of his employment. If you find from the evidence that said glass broke by reason of a defect therein, and that it was one of the risks incident to plaintiff's calling; or if you find that plaintiff knew that said passageway was obstructed, and that with such knowledge he proceeded to carry said glass through said passageway, and that said glass was broken by said obstructions, then you should find that plaintiff assumed the risks of carrying the glass the way and where he did, and your verdict should be for the defendant."

The foregoing instructions, and instructions 2 and 3 set out in another part of this opinion, all given by the court on its own motion, cover the same ground as those tendered by the defendant. That being true, it was not error to refuse the instructions tendered. This disposes of all the questions presented by the petition in error and the argument.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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DANIEL I. LAY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ADALINE L. CHADWICK, DECEASED, APPELLANT, v. ANNA HONEY ET AL., APPELLEES.

FILED APRIL 2, 1902. No. 11,519.

Commissioner's opinion. Department No. 2.

1. **Principal and Agent: PAYMENT OF NOTE TO THIRD PERSON: BURDEN OF PROOF OF AGENCY.** One who makes payment of a promissory note to a person, not the owner of the note, and not in possession of it, at a place other than the place of payment designated therein, assumes the burden of proving that the party to whom payment was made was empowered to collect the money.
2. **Principal and Agent: RECEIPT OF INTEREST NOT AUTHORITY FOR COLLECTION OF PRINCIPAL.** The fact that the money to pay interest coupons has been paid to such person who sent the same to the original mortgagee at the place of payment; that it was sent to the owner of the note and mortgage, who returned the paid coupons to the mortgagee, who in turn sent them to the person to whom the money was paid, to be delivered to the mortgagor, is not sufficient ground to infer that such person has authority to collect the principal sum, where the evidences of indebtedness are not, and have not been, in his possession.
3. **Principal and Agent: SUFFICIENCY OF EVIDENCE OF AGENCY.** Evidence examined, and held not sufficient to show authority on the part of the person to whom the money was paid, to collect the same.

APPEAL from the district court for Hitchcock county.  
Tried below before NORRIS, J. *Reversed with directions.*

Lay v. Honey.

*W. S. Morlan*, for appellant.

*F. I. Foss, F. M. Flansburg, B. V. Kohout and R. D. Brown*, contra.

BARNES, C.

On the 15th day of March, 1889, Anna Honey and Albert Honey executed and delivered to the Loan & Guarantee Company of Connecticut their negotiable note, or bond, for the sum of \$600, with ten semi-annual interest coupons, or notes, attached. The note was to mature on the 1st day of March, 1894, and it was payable, as were all of the interest coupons or notes, at the office of the Loan & Guarantee Company of Connecticut, at Hartford in that state. To secure the payment thereof a real estate mortgage was executed to the said Loan & Guarantee Company, which was duly recorded, and on the 2d day of July, 1889, the principal note, together with the interest coupons and the mortgage securing the payment of the same, were sold, indorsed and delivered to Adaline L. Chadwick, of Lyme, Connecticut. The loan was negotiated by Dawes & Foss, of Crete, Nebraska, and the payment of each of the interest notes or coupons, except the last one, was made by Anna Honey and Albert Honey to Dawes & Foss, or Fayette I. Foss, by whom the money was sent to the Loan & Guarantee Company, and in turn forwarded to the owner and holder of the note and mortgage, Adaline L. Chadwick, who, when she received the money, sent the paid coupon to the Loan & Guarantee Company, and it was forwarded to Fayette I. Foss, who thereupon delivered it to the mortgagors. On the 24th day of March, 1893, the mortgaged property was sold, by Albert Honey and Anna Honey, to one Peter Haegen, who assumed the said mortgage indebtedness and agreed to pay it. On or about the 1st day of May, 1894, and about two months after the note became due, Peter Haegen paid the principal and the last interest coupon to Fayette I. Foss, of Crete, Nebraska, who failed to forward the money

to the guarantee company, but retained the same and applied it to his own use. This payment was made at the bank in Trenton, Nebraska, and at the time the money was so paid neither Fayette I. Foss nor the guarantee company had possession or control of the note and mortgage. After this time Adaline L. Chadwick departed this life, leaving a last will and testament, of which the plaintiff, Daniel I. Lay, was the executor; said will was duly admitted to probate; said executor qualified and was authorized to bring this suit. The money not having been paid either to Adaline L. Chadwick during her lifetime, or to him after he became the executor of her estate, he commenced an action in the district court for Hitchcock county to foreclose the mortgage. The petition was in the usual form, and to this an answer was filed setting up several matters in defense, among which was the defense of payment; and it was alleged in the answer that the note and mortgage had been paid to Fayette I. Foss, who was the agent of the Loan & Guarantee Company, the mortgagee; and that said guaranty company was, at said time, the agent of Adaline L. Chadwick, and duly authorized to receive the payment of and collect the money due upon the note and mortgage and release the same of record; and that the said Fayette I. Foss was the agent of the said Loan & Guarantee Company also for that purpose; and that by payment to him the said mortgage debt was canceled and that the mortgage should be released. There was a reply, in the form of a general denial. The cause was duly tried, and on the 2d day of April, 1900, the court made a general finding in favor of the defendants, on which finding a decree was entered that the note and mortgage sued upon should be canceled and discharged of record. From this decree the plaintiff appeals.

Upon the trial all of the defenses pleaded in the case, except the defense of payment, were abandoned, so that the only thing for us to consider is, whether or not the evidence sustains the finding on that question. It was conceded that the note was negotiable, that it, together

with the mortgage, was owned by Adaline L. Chadwick, and had been her property and in her possession ever since July 3, 1889. It was provided in the note itself that it was payable at the office of the Loan & Guarantee Company in Hartford, Connecticut. As before stated, the payment was made to Fayette I. Foss, who did not have either the note or the mortgage in his possession, at the bank in Trenton, Nebraska. In this case it devolves upon the defendants to show by a preponderance of the evidence that Fayette I. Foss had authority from the owner and holder of this note to receive such payment. *Chandler v. Pyott*, 53 Neb., 786; *South Branch Lumber Co. v. Littlejohn*, 31 Neb., 606; *Richards v. Waller*, 49 Neb., 639; *Greenman v. Swan*, 51 Neb., 81; *Campbell v. O'Connor*, 55 Neb., 638.

The defendants produced Fayette I. Foss as a witness upon the trial, and it may be conceded that his evidence, which is quite voluminous, establishes the fact that he had general authority given him by the president of the guarantee company to collect the interest and principal of notes and mortgages owned and held by that company, although this, to some extent, is denied by the evidence of one of its officers, which we find in the record. It is not shown, however, by any evidence that Foss was the agent of Adaline L. Chadwick, or the plaintiff, to collect the principal of this loan. In fact it appears that Mr. Foss did not know them, never had any correspondence with either of them, and had no knowledge that Adaline L. Chadwick was the owner and holder of the note and mortgage in question. This being shown by the evidence, beyond any question, it can not be claimed that he was authorized by Adaline L. Chadwick, or the plaintiff, to collect this money.

We are next required to determine whether or not the Loan & Guarantee Company of Hartford, Connecticut, which was the original mortgagee, was the agent of Adaline L. Chadwick, or the plaintiff, for the collection of the mortgage debt. The only direct evidence bearing

upon that question is the evidence of Frank E. Johnson, now president of the Loan & Guarantee Company, and Daniel I. Lay, the plaintiff in this case. The testimony of Frank E. Johnson upon that point is as follows:

Q. Will you state the method of collecting the interest on this bond (Exhibit A) as between the Loan & Guarantee Company and Adaline L. Chadwick?

A. The interest was received by the Loan & Guarantee Company of Connecticut, in accordance with the provisions of the note and mortgage making it payable at the office of the Loan & Guarantee Company of Connecticut. The money was forwarded to Mrs. Chadwick, who thereupon sent back the coupon.

Q. Did Adaline L. Chadwick ever authorize the Loan & Guarantee Company of Connecticut to collect the amount of the principal due on this bond?

A. She did not. We having sold the loan to her, we considered that we had the moral obligation to look after it, but were never authorized by her as her agents in any way.

Q. The payment of interest went through the office of the Loan & Guarantee Company?

A. Yes, sir.

Q. When did Mrs. Chadwick de cease?

A. I do not know.

Q. Did you do your business directly with her?

A. Most with her.

Q. And the company and yourself acted as agents of Mrs. Chadwick?

A. No, not as her agents. We considered it our moral duty, after having sold the loan, to look after it.

Q. That was a relationship between you?

A. We simply forwarded the money to her and she sent us the coupons.

Q. Weren't you acting as her agents?

A. We were simply getting her what was her own.

Q. Weren't you doing her business?

A. No, not necessarily. We did not consider so.

Q. Weren't you doing business for her?

A. No. In that way we were doing business for the borrower in getting the money to the party to whom it belonged.

Q. You say that you were not Mrs. Chadwick's agent in these matters?

A. We did not consider ourselves.

Q. How did you know that Mrs. Chadwick never authorized any one to collect this loan?

A. She never authorized us to do so.

Q. She never authorized others then?

A. She never authorized us. She might have authorized some one else.

Daniel I. Lay testified on the question of agency to collect the money due on the note, as follows:

Q. Were you acquainted with Adaline L. Chadwick during her lifetime?

A. I was.

Q. What relation was she, if any, to you?

A. She was a sister to me.

Q. When did she die?

A. May 1st of this year, 1899.

Q. What official position if any do you hold toward her estate?

A. As an executor.

Q. State whether or not you acted for or assisted Adaline L. Chadwick in the management of her affairs and were familiar with the same prior to her death and if so to what extent?

A. I was familiar by being her chief adviser.

Q. Cover the time?

A. For the past ten or twelve years.

Q. Did you know about this loan?

A. Yes, sir.

Q. I now hand you Exhibit A and ask you to state whether or not you ever saw that before, and state under what circumstances and all about [it].

A. I saw this about July 3, 1889, when it came into her possession.



Q. State under what circumstances you first saw this bond. Where was you?

A. I saw it at Lyme.

Q. At whose house?

A. At my own house. She was one of our family.

Q. Was it directed to you?

A. It was directed to her from the Loan & Guarantee Company.

Q. How did you happen to see it?

A. She gave all such matters for me to examine.

Q. Did she show it to you as soon as she received it?

A. Undoubtedly, as she did all of the business.

Q. Did she live in the same house?

A. In the same house and same family.

Q. State if you know under what circumstances Adaline L. Chadwick became the owner of the bond and the mortgage which secured it?

A. By purchase from the Loan & Guarantee Company.

Q. Did you have anything to do with it?

A. By assisting her in this loan.

Q. Do you know what disposition Adaline L. Chadwick made of the bond and the mortgage after it was sold to her?

A. She held it.

Q. Did she receive interest?

A. And received interest from the Loan & Guarantee Company.

Q. How did she receive the interest?

A. The interest was sent to her from the Loan & Guarantee Company and she returned the coupons.

Q. Did she return the coupons before or after she received the money?

A. After.

Q. Will you state by whom these papers are owned at the present time and by whom they were owned at the time this action was brought?

A. By the estate of Adaline L. Chadwick.

Q. Will you state what methods were pursued, if any,

in regard to the collection of the principal due on this bond?

A. There was no collection of the principal.

Q. Did Adaline L. Chadwick ever attempt to collect it?

A. No, she never did to my knowledge.

Q. Do you know whether she ever authorized anybody to collect it for her?

A. As far as I know she never did.

Q. Did you have charge of the loan as adviser yourself?

A. Yes.

Q. Were your relations to her estate so that you would know about it?

A. She never did any business—there was no business transactions without first consulting me so far as I know.

Q. Did she have any agents that were authorized to collect either the principal or interest?

A. Not that I know of.

Q. Did Adaline L. Chadwick ever receive or collect any part of the principal of this bond represented by Exhibit A?

A. No.

Q. Have you as executor of her estate ever received or collected any part of the amount due on these papers?

A. Never.

Q. Have you ever authorized anyone for yourself or Adaline L. Chadwick to collect the amount due on the bond?

A. No.

Q. In whose possession and control have these papers been since you have qualified as executor?

A. In mine, except a short time they were in the hands of my attorney in this case.

Q. Were these papers, being the bond and mortgage securing it, ever in the possession and control of the Loan & Guarantee Company of Hartford, or Fayette I. Foss, or Dawes & Foss after the same were purchased by Adaline L. Chadwick?

A. Not to my knowledge.

The foregoing is all of the evidence bearing upon the question of the authority of Fayette I. Foss and the Guarantee Loan Company, or either of them, to collect the money in question.

In *Fry v. Curtis*, 52 Neb., 406, this court made use of the following language: "It has several times been held by this court that authority to collect interest installments is not alone sufficient from which to infer authority to collect the principal, where the evidences of indebtedness are negotiable and are not in the possession of the person assuming to act as agent."

In the case of *City Missionary Society v. Reams*, 51 Neb., 225, it is stated: "Payment in the case at bar was not made to the plaintiff, the owner of the note and mortgage, nor to a person who had possession of them; hence it was for defendants to establish by the proofs that the party to whom they made payment was empowered, or possessed ostensible authority, to collect the money." In that case the note and mortgage in suit were sold and transferred for value to the City Missionary Society of Hartford. Reams paid the first two coupons falling due, to the Nebraska & Kansas Farm Loan Company, who forwarded the money to George W. Moore & Co., a firm of loan brokers at Hartford, and the last named firm paid the money to plaintiff, took up the coupons and forwarded the same to the Nebraska & Kansas Farm Loan Company, who delivered them to the makers. On the 4th day of October, 1890, for the purpose of paying off the note and mortgage, the Reams gave their negotiable promissory note for \$350, due October 1, 1895, to the said Nebraska & Kansas Farm Loan Company, and to secure the payment executed and delivered to the company a mortgage upon their real estate. The note and mortgage were sold and assigned to one Slocum, and the money derived therefrom was not used to pay off the first promissory note held by plaintiff. It was held that there was not sufficient evidence to show that the Nebraska & Kansas Farm Loan Company had any authority to collect the money

## Lay v. Honey.

for the holder of the note and mortgage, and a foreclosure was decreed.

In the case of *Bull v. Mitchell*, 47 Neb., 647, it was held: "Where a mortgage was made to secure the payment of a negotiable promissory note, the parties making such note and mortgage are not necessarily entitled to protection as to payments to the mortgagee made solely on the assumption that the original payee of the note still remains the holder thereof." That "Where payment of a negotiable note secured by a mortgage was made to an investment company of which the mortgagee was manager and such payment was never forwarded to the party to whom such note had been transferred, *held*, that the mere fact that antecedent payments made in like manner had been made to be forwarded to the transferee of such note and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded, it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent." The same rule was laid down by this court in the case of *Richards v. Waller*, 49 Neb., 639.

In *Porter v. Ourada*, 51 Neb., 510, it was said: "The mere fact that a mortgagee has been in the habit of collecting interest from the mortgagor and remitting it to an assignee of the mortgage is not alone sufficient to authorize the conclusion that the mortgagee's agency was such as to authorize him to collect the entire unmatured mortgage debt."

In the case of the *First National Bank of Omaha v. Chilson*, 45 Neb., 257, it was said: "Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not payment of the note. In such case the person receiving the money becomes the agent of the payor, not of the payee."

In *Greenman v. Swan*, 51 Neb., 81, and *Herbage v. Moodie*, 51 Neb., 837, the facts were somewhat similar to those in the case at bar; and yet the court held that there

was no sufficient evidence to establish the fact of agency, and decrees of foreclosure were entered in each of those cases. See, also, *Chandler v. Pyott, supra*.

Many other cases decided by this court might be cited upon this question where the evidence of agency is much stronger than it is in the case at bar, and yet it was held insufficient to establish such fact. In view of the record herein we are constrained to hold that the evidence is insufficient, and that there is no evidence to establish the fact of agency to collect the money due on the note and mortgage in question for the plaintiff, or Adaline L. Chadwick, either on the part of the guarantee company or Fayette I. Foss.

It is contended that the assignee of the note and mortgage was guilty of negligence in not notifying the defendants that the same had been transferred to her. This contention can not be maintained. The note was payable, by its terms, at the office of the Loan & Guarantee Company in Hartford, Connecticut, and if the money had ever been paid at that place there is no doubt but that it would have reached its proper destination. If there was any negligence on the part of any one in this case, it was on the part of defendant, Peter Haegen, who made the payment. This payment was made to the bank at Trenton, without any directions whatever. By simply instructing the bank to hold the money until the note and mortgage were delivered up and then pay it to Fayette I. Foss, the defendant could have protected himself and this controversy would never have arisen. There being no evidence to sustain the finding that the note and mortgage in question have been paid to one authorized to receive such payment, the decree appealed from should be reversed.

For the reasons above given we recommend that the findings and decree of the district court be set aside and reversed, and that a mandate issue to said court to enter a proper and suitable decree of foreclosure herein.

OLDHAM and POUND, CC., concur.

The decree of the district court is reversed and the case remanded with directions to the lower court to enter the proper decree of foreclosure herein.

REVERSED WITH DIRECTIONS.

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EMILY V. LUCE, APPELLEE, v. KRISTINE N. SORENSEN ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 11,541.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: SUFFICIENCY OF EVIDENCE OF "NO PROCEEDINGS AT LAW."** Evidence of attorney, in whose hands note and mortgage have been since maturity, that no proceedings at law have been had on them in county where property is situated and where defendants were served with summons, and none elsewhere to his knowledge, is sufficient, in absence of all contradiction, to support in this respect a decree for plaintiff.
2. **Mortgage Foreclosure: EXTENSION AGREEMENT NOT PLEADED.** An extension agreement, which is not pleaded and as to which there is no definite evidence, held properly disregarded.

APPEAL from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*T. M. Morrow*, for appellants.

*Tibbets Bros., Morey & Anderson*, contra.

HASTINGS, C.

Appellants claim two grounds for reversal of the decree of foreclosure entered in the trial court in this case. First, that the proof of no previous proceedings at law is insufficient; second, that there is proof of a valid extension of time which had not elapsed when the suit was commenced.

An examination of the record fails to show that either complaint is well founded. The evidence of no proceedings at law is by Mr. Russell, plaintiff's attorney. He testified that he knew that no proceedings had been had in Douglas

Luce v. Sorensen.

county to collect the note. He also testified that the note had been in his possession and sole charge for purposes of collection for more than two years, and since before its maturity. The defendants were residents apparently of Douglas county and there had been a good deal of negotiating with reference to a renewal of the note and mortgage. The evidence seems ample to establish *prima facie* that no proceedings had been had at law. No attempt to contradict it, or to show the existence of such proceedings, was made.

As to the other reason for reversing the decree, it should be sufficient to say that no mention of it is to be found in the answer, which is a mere general denial. No renewal or extension is pleaded in any way, and the evidence does not show the existence of any. An attempt to arrange for an extension and an appointment of one W. H. Russell as defendants' agent appears, and payment of a part of an agreed consideration for such extension is shown by indorsement on a writing that purports to make such appointment. This is all and falls far short of proving an extension even if one was pleaded.

Appellants claim that the amount of the decree is excessive because of the inclusion of \$19 for insurance and because of the indorsement on the contract with Russell of \$30. Russell testified that he was at the date of this payment the agent of the plaintiff. On this ground it is claimed that the \$30 should be credited upon the note and mortgage of plaintiff. As before stated, there is no allegation on which this claim of payment can be based. There is nothing to indicate that there was any claim in the trial court that this \$30 was a payment on the mortgage. There is evidence that the \$19 was actually paid by plaintiff for insurance.

It is recommended that the decree of the trial court be affirmed.

KIRKPATRICK and DAY, CC., concur.

**AFFIRMED.**

Morrison v. Lincoln Savings Bank & Safe Deposit Co.

WILLIAM G. MORRISON, APPELLEE, v. LINCOLN SAVINGS  
BANK & SAFE DEPOSIT COMPANY, APPELLEE, IM-  
PLEADED WITH HERBERT W. DAVIS ET AL., APPELLANTS.

FILED APRIL 2, 1902. No. 12,189.

Commissioner's opinion. Department No. 3.

**Receiver: OFFER OF COMPROMISE: ACCEPTANCE BY COURT: DISCRETION.**

An offer of compromise, made by debtors of an insolvent bank to the receiver thereof, examined, and *held* there was no abuse of discretion on the part of the trial court in directing the receiver to accept it.

APPEAL from the district court for Lancaster county.  
Tried below before CORNISH, J. *Affirmed.*

*Stewart & Munger and Frederick Shepherd, for appel-  
lants.*

*A. S. Tibbets and L. C. Burr, contra.*

*Lambertson & Hall, amicus curia.*

ALBERT, C.

The Lincoln Savings Bank & Safe Deposit Company is a corporation organized under the banking laws of this state. On July 22, 1896, it was found, in this action, to be insolvent and John E. Hill was appointed its receiver. A large portion of its assets consisted of the amount due from stockholders on account of unpaid subscriptions and the added penalty. On May 29, 1900, it was found by the court that all other assets of the bank had been exhausted and the receiver was ordered to proceed against the stockholders on their liability for unpaid subscriptions. In pursuance of such order suit was begun in the district court for Lancaster county on the following August against all of such stockholders. In July, 1901, several of the said stockholders united in a proposition to the receiver to pay a specific amount in full settlement and compromise of all liability of the stockholders joining in said offer.



The receiver submitted the proposition to the district court, under which he held his appointment, and recommended its acceptance. The appellants, George W. Peas, W. H. Davis, Paul Holm and Cyrus W. Palmer, creditors of the insolvent bank, intervened and protested against the acceptance of such offer. A hearing was had, whereupon the court dismissed the petition of intervention and entered an order, which, so far as is material to this case, is as follows:

"Now, therefore, the court \* \* \* doth order, adjudge and decree that the said receiver, John E. Hill, be, and he is hereby, empowered, authorized and directed to compound, compromise and settle in full for the sum of \$30,000 the liability of each of the following named persons: \* \* \*

"It is further ordered and decreed that said sum of \$30,000 shall be paid to the receiver within twenty days from the date of this decree and on a failure to pay the same within twenty days, this decree shall stand vacated without further order of the court.

"It is further ordered that on the payment of said \$30,000 to said receiver, he is hereby authorized and directed to execute to each of the above named estates and persons a release and acquittance in full of all liability to the Lincoln Savings Bank & Safe Deposit Company and to its receiver, [and] the said John E. Hill, is directed to dismiss the above named suit in which he is plaintiff as to the foregoing named persons except where judgments have been entered, but shall continue the same as to all persons not named or included in this decree.

"In those cases where judgment has been entered against any of the above named persons, the receiver is directed to release and satisfy the same of record. In the event the receiver ascertained that any of the above named persons have not contributed to the said fund of \$30,000 offered to be paid by the above named stockholders or the committee making the proposition in their behalf, the receiver is directed not to deliver to such persons a release

or acquittance of his liability until the further order of the court."

From said order the interveners appeal to this court. Complaint is made of this order, on the ground, as stated in appellants' brief, "It authorized the compromise of a suit against persons where neither the recovery of a judgment nor a collection thereof was doubtful."

That a receiver, acting under an order of the court, may compromise a suit where the recovery or the collection of a judgment is doubtful, compound bad or doubtful debts and, upon a new and sufficient consideration, release debts which are neither bad nor doubtful, are familiar rules which will be readily recognized without the citation of authorities. That the order included some debts that were neither bad nor doubtful, for present purposes, may be regarded as established. That to authorize the release of such claims for less than the amount actually due thereon, except on a new and sufficient consideration, would be an abuse of discretion, will be conceded. But it must be kept in mind that the proposition for the compromise was the joint offer of a number of debtors. As to the character of the debts included in such offer, the evidence would sustain a finding that some were good and collectible, some doubtful and some wholly bad. As to the amount of those unquestionably good, there is some conflict in the evidence; but from the nature of the evidence, the court would be warranted in finding that it was less than the amount actually received by the terms of the compromise. Indulging, then, as we must, all legitimate presumptions in favor of the order of the trial court, it appears that by accepting the proposition the receiver collected the good debts in full and realized something, at least, to apply on those that were bad and doubtful, and, as to those included in the compromise, ended what promised to be expensive and vexatious litigation for all parties. By the offer of compromise a new consideration moved from each of the debtors joining therein; upon its acceptance, each became bound by a new contractual obligation,

whereby he became liable to the extent of such offer for the debts of all the others. Hence no one of the debts included therein can be said to have been released for less than the amount actually due thereon and without a new consideration. The sufficiency of such new consideration was submitted to the trial court on the evidence and the record in the case. We have examined the evidence, and are satisfied that, in view of all the facts, there was no abuse of discretion in directing the acceptance of the offer of compromise. Other complaints are urged, but we think they are fully disposed of in the foregoing.

It is recommended that the order of the district court be affirmed.

AMES and DUFFIE, CC., concur.

AFFIRMED.

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JOSEPH PATTERSON V. THE STATE OF NEBRASKA, EX REL.  
D. S. DUSENBERRY.

FILED APRIL 3, 1902. No. 12,241.

Commissioner's opinion. Department No. 1.

**Mandamus:** AGAINST "ADVERTISING" FUND: ALLEGATION OF MONEY IN FUND. When an application for a writ of mandamus and the alternative writ to require the chairman of the county commissioners to sign a warrant drawn against an "advertising" fund contain no allegation of money in the treasury or tax levied, or appropriation, for such fund, they state no cause of action.

ERROR from the district court for Nuckolls county.  
Tried below before STUBBS, J. *Reversed.*

*T. W. Cole and S. W. Christy, for plaintiff in error.*

*H. H. Mauck, contra.*

DAY, C.

The relator brought this action in the district court for Nuckolls county against the respondent to compel him, as

chairman of the board of county commissioners, to sign two certain warrants drawn in favor of the relator by order of the board of county commissioners. A peremptory writ of mandamus was allowed by the district court, to review which the respondent has brought the case to this court by proceedings in error.

The record shows that relator filed with the county commissioners of Nuckolls county two claims for publishing the delinquent tax list. One of the claims was for a balance of \$23.24 for publishing the delinquent tax list in October, 1899, and one for \$83 for publishing the delinquent tax list in October, 1900. These claims were duly allowed by the board of county commissioners, the respondent, who was chairman of the board, voting against the allowance, and the county clerk was ordered by the board to draw warrants of the county on the "advertising fund" in payment of the respective claims. Pursuant to this direction the county clerk drew two warrants in favor of the relator for the respective amounts of the claims, but the respondent, as chairman of the board, refused to sign them.

One of the errors alleged in this judgment awarding a writ of mandamus is that relator's allegations are insufficient, in that they do not show that relator's claims were legal obligations of the county. To this it is a sufficient answer to say that the claim is alleged to have been duly allowed by the county board, and such allowance would, *prima facie*, settle their justness. It is urged that the allegations do not set forth the existence of any money in the fund to be drawn against. A careful examination of the record as bearing upon the question of this objection shows that neither in the alternative writ, nor in the affidavit upon which it was issued, is there any allegation of there being any money in the treasury to the credit of any "advertising fund." There is no allegation of any levy for such a fund, and no such levy is authorized by law. The allegations are that the clerk was instructed to draw, and did draw, said warrants against the "advertising

fund." We do not mean to be understood as holding that the county board could not create by proper appropriation a fund to be used for publishing the tax lists and that for its own convenience it might not term such fund "advertising fund." What we hold is, there is no such fund known to the law as an "advertising fund," and no allegations appear anywhere that such a fund was created. Such a fund, if existing, would naturally be derived from payments to redeem from tax sales, or in payment of tax sale purchases. If it was in the treasury, it could, no doubt, be appropriated to the payment of claims like relator's. If the money was not in the hands of the treasurer, no warrant could be legally drawn against it.

Section 34, article 1, chapter 18, of the Compiled Statutes provides that it shall be unlawful for the county board to issue any warrants exceeding the aggregate of eighty-five per cent. of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same. There was some proof tending to show that the treasurer had in his hands money sufficient to pay these warrants, which was credited on his books to the "advertising fund." To warrant the introduction of proof of there being such a fund as an "advertising fund," or that the money was in the treasury, suitable allegations of the facts must be alleged; but, as above indicated, no such allegations are made. An objection to all evidence because of insufficiency of relator's allegations, and also a specific objection to proof of the existence and amount of an "advertising fund" in the county treasury, as immaterial, irrelevant and incompetent, was overruled. This action of the trial court seems to us erroneous, as overlooking the fact that there were no allegations on which to base such testimony.

The form of the warrants is also objectionable, but respondent did not base his refusal to sign them specially upon that ground. In this court, however, this point is argued.

Section 35 of article 1, chapter 18, Compiled Statutes,

provides that "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such sum." The warrants as drawn by the clerk were alike in form, one of which we set out as follows:

"Amount levied, ———.

"Amount issued, \$83.

"STATE OF NEBRASKA, NUCKOLIS COUNTY.

"Treasurer of said County:

"Pay to D. S. Dusenbery, or order, eighty-three dollars, and charge to account of advertising fund.

\_\_\_\_\_  
"Chairman County Commissioners.

"JAMES A. HEDGCOCK,

"County Clerk."

It is to be noted that there is nothing on the face of the warrant indicating the amount levied or appropriated to the fund upon which it was drawn, and in this respect fails to comply with the plain requirements of the statute. From what has been said it follows that the district court erred in rendering judgment for the relator.

We therefore recommend that the judgment be reversed, and the cause remanded to the district court for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

\_\_\_\_\_  
THE STATE OF NEBRASKA, EX REL. THE CHADRON LOAN &  
BUILDING ASSOCIATION, RELATOR, V. WM. H. WESTOVER.  
JUDGE OF THE DISTRICT COURT OF DAWES COUNTY,  
RESPONDENT.

FILED APRIL 2, 1902. No. 12,531.

Commissioner's opinion. Department No. 2.

1. **Mandamus:** REVIEW AS ADEQUATE REMEDY AT LAW: STATUTES. An ultimate right of review by error or appeal is a plain and adequate remedy within the purview of section 646, Code of Civil Procedure.

2. **Mandamus: To VACATE ORDER SETTING ASIDE DECREE: REVIEW THE REMEDY.** As an order setting aside a decree and granting a new trial, made without jurisdiction, may be reviewed on error or appeal as soon as it results in a new decree, a writ of mandamus will not issue to compel vacation of such order and reinstatement of the original decree.

ORIGINAL application in this court for a writ of mandamus to compel respondent to vacate an order setting aside a decree in foreclosure. *Writ denied.*

*Albert W. Crites*, for relator.

*Allen G. Fisher*, for respondent.

POUND, C.

This is an application for a writ of mandamus commanding the respondent, as judge of the district court for Dawes county, to vacate an order setting aside a decree of foreclosure and granting a new trial, and to reinstate said decree. The case is very like *Schuyler Building & Loan Association v. Fulmer*, 61 Neb., 68, 84 N. W. Rep., 609, and, as it is presented upon the relator's showing and the return, there is at least room for grave doubt as to the jurisdiction of the district court to set aside the decree. But we think we ought not to pass upon that question now, and that the writ ought not to issue in such a case. It is expressly provided by statute that "this writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Section 646, Code of Civil Procedure. We are satisfied that an ultimate right of appeal is a plain and adequate remedy, within the purview of that section. It is true the parties may be put to annoyance, expense and delay in a new trial before such right becomes available. But the acknowledged evils of interlocutory appeals have required that only final judgments be made appealable. The remedy is plain, adequate and complete. All that may be said is that it is not speedy. It is clear that such remedy exists in the case at bar and may be availed of as soon as the

order in question results in a new decree. *Schuyler Building & Loan Association v. Fulmer, supra; Bigler v. Baker*, 40 Neb., 325, 330. This court has said heretofore that no proceeding "has been so much abused as the remedy by mandamus." *State v. Merrell*, 43 Neb., 575, 579. We do not think it ought to be employed to review interlocutory proceedings, however unauthorized or improper, which may be corrected ultimately by appeal from final decree, except in cases where a mandate of this court is disregarded, and interference becomes necessary to give it effect.

We recommend that the writ be denied.

BARNES and OLDHAM, CC., concur.

WRIT DENIED.

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THE CHESHIRE PROVIDENT INSTITUTION V. FRED E. BICK-  
NELL ET AL.

FILED APRIL 17, 1902. No. 10,404.

Commissioner's opinion. Department No. 3.

Principal and Agent.

ERROR from the district court for Dundy county. Tried below before NORRIS, J. *Affirmed.*

*Cobb & Harvey*, for plaintiff in error.

*P. W. Scott*, contra.

AMES, C.

The facts in this case are in all essential particulars identical with those in the cases of *The Cheshire Provident Institution v. Gibson*, ante, page 392, 89 N. W. Rep., 243, and of *Cheshire Provident Institution v. Feusner*, 63 Neb., 682, 88 N. W. Rep., 849. Under the authority of those decisions it is recommended that the judgment of the district court be affirmed.

ALBERT and DUFFIE, CC., concur.

AFFIRMED.



**WILLIAM C. ORR ET AL., APPELLEES, V. THE CITY OF OMAHA  
ET AL., APPELLANTS.**

FILED APRIL 17, 1902. No. 11,117.

Commissioner's opinion. Department No. 2.

1. **Municipal Corporations: STREET PAVING WITH AND WITHOUT PETITION: COST.** The act of 1887 incorporating metropolitan cities authorized any such city to pave any street, alley or avenue within its limits either with or without a petition of the property owners representing a majority of the feet-frontage abutting on such street, alley or avenue; but without such petition the city could not make the cost of the paving a charge against the abutting property.
2. **Estoppel: BY RECITAL IN DEED: GRANTEE ASSUMING ILLEGAL TAXES.** The covenants in a deed against incumbrances excepting all taxes and assessments and concluding with "which grantee assumes and agrees to pay," in the absence of any evidence that anything on that account was deducted from the purchase price, will not estop the grantee from defending against the payment of illegal and void assessments. Evidence of admissions examined, and held not to create an estoppel.
3. **Municipal Corporations: STREET PAVING: CURBING AND GUTTERING: COST.** Under the act of 1887, when the city has ordered a street paved, it may curb and gutter the same and make the expense thereof a legal charge upon the abutting real estate.

**APPEAL** from the district court for Douglas county.  
Tried below before DICKINSON, J. *Modified and affirmed.*

*James H. Adams*, for appellants.

The plaintiff, Orr, is estopped from attacking the validity of the taxes complained against, for the reason that as grantee of the property he assumed and agreed to pay "all unpaid taxes and assessments." *Skinner v. Reynick*, 10 Neb., 323; *Bond v. Dolby*, 17 Neb., 491; *Koch v. Losch*, 31 Neb., 625; *Horton v. Davis*, 26 N. Y., 495; *Kruger v. The Adams & French Harvester Co.*, 9 Neb., 526; *Viergutz v. Aultman, Miller & Co.*, 46 Neb., 141; *Nye v. Fahrenholz*, 49 Neb., 276; *Norfolk State Bank v. Schwenk*, 51 Neb., 146; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb., 657; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb., 286.

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*Constantine J. Smyth, contra.*

The plaintiff, Orr, was not so estopped, because (1) a general recital is no estoppel: *Hall v. Benner*, 1 Penrose & Watts (Pa.), 402, 21 Am. Dec., 394-399. (2) He is not estopped from denying the validity of the tax even if he agreed to pay this particular tax, but was ignorant of his rights with respect to it: *New Orleans v. United States*, 10 Pet. [U. S.], at page 734; *Bybee v. Oregon & C. R. Co.*, 139 U. S., 663; *Goodman v. Randall*, 44 Conn., 321; *Hartsuff v. Hall*, 58 Neb., 417; *Grant v. Bartholomew*, 58 Neb., 839; *Scott v. Society of R. I.*, 59 Neb., 571; *Batty v. City of Hastings*, 63 Neb., 26.

BARNES, C.

This is an appeal from a decree of the district court for Douglas county declaring certain paving taxes and taxes for curbing and guttering the street so paved null and void, and ordering the treasurer of the city of Omaha, and his successors in office, to cancel the same of record. Appellants contend that the decree should be modified. They do not contend that the tax in question levied to pay for paving is a valid tax. They, however, contend that the tax levied and assessed upon the abutting property belonging to appellees to pay for curbing and guttering the street which had theretofore been ordered paved is valid, and that the decree should be so modified as to permit the city to proceed with the collection of the same. It appears from the record and evidence that the paving district in question was created April 11, 1889, and afterwards a petition was presented to the mayor and city council, by what was then supposed to be the owners representing a majority of the feet-frontage on the street embraced in said district, praying that the street be ordered paved. Thereupon the city council duly made such order and gave notice to the property owners to determine the kind of paving material which they desired to have used in carrying out the improvement. The owners, in due time,

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designated that they desired the street paved with red sandstone on a sand foundation. The city council complied with the request of the property owners and the street was so paved. It further ordered the city council ordered the street, within the district, to be properly and suitably curbed and guttered, which was done, and the cost of the same was apportioned among the several property owners thereupon a tax was levied for the payment thereof. The city, the appellant herein, now comes into competition asking for the pavement of the street as proposed by the property owners representing the feet-frontage abutting upon that portion of the street so paved. The questions involved herein are the interpretation and construction of some of the provisions of the act of the legislature of 1887 "incorporating cities, and defining, regulating, and governing the duties, powers and government." The provisions of the city charter of the city of Omaha at the time the same were complained of in this action were provided in section 69 of said act as follows: "The mayor and council shall have power to open, extend, alter, grade, curb and gutter, park, beautify, improve and keep in good repair, or cause to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city, or to the established grade, or to alter the grade partially, or to otherwise improve any width or part of a street, avenue, or alley, and may also construct, alter, improve, cause and compel the construction and repair of any street, avenue, or alley in such city, of such material and in such manner as they may deem proper and necessary; and to defray the cost and expense of such improvements, or any part thereof, the mayor and council of such city shall have authority to levy and collect special taxes upon the lots and pieces of ground adjoining upon the street, avenue, alley, or sidewalk, or upon the whole or in part opened, widened, curbed,

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graded, parked, extended, constructed or otherwise improved or repaired or which may be especially benefited by any of said improvements." It is further provided in said section as follows: "The mayor and council of any city of the metropolitan class shall have power to pave, repave, or macadam any street or alley, or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract and under the superintendence of the board of public works of the city. Whenever the owners of lots or lands abutting upon the streets or alleys within any paving district representing a majority of the feet front thereon shall petition the council to pave, repave, or macadam such streets or alleys, it shall be the duty of the mayor and council to pave, repave, or macadam the same, and in all cases of paving, repaving or macadamizing there shall be used such material as such majority of the owners shall determine upon.

*"Provided*, the council shall be notified in writing by said owners of such determination within thirty days next after the passage and approval of the ordinance ordering such paving, repaving, or macadamizing. In case such owners fail to designate the material they desire used in such paving, repaving, or macadamizing in the manner and within the time above provided the mayor and council shall determine the material to be used. The cost of paving, macadamizing, or repaving the streets and alleys within any paving district, except the intersections of streets and space opposite alleys within such district shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the feet front so abutting upon the streets and alleys." It is further provided in the said section as follows: "That curbing and guttering shall not be ordered or required to be laid on any street, avenue, or alley not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue, or alley to be curbed and guttered."

It will be observed that this act grants the city full power, in the discretion of its mayor and council, to pave, curb and gutter any street, alley or avenue within its limits. The city can do this at any time without a petition of the property owners therefor. It is plain that if no petition is presented and such paving is ordered without the request of the property owners, the city itself must pay for the expense thereof. The property owners in any paving district established by the city representing a majority of the feet-frontage abutting upon any street in such paving district may petition the city council for the pavement thereof. When such petition is presented it becomes the duty of the mayor and city council to at once make an order for the paving of such street, and in that event the expense of the improvement may be determined and apportioned among the property owners and taxed up to the property abutting on the street so paved. In this case, it being conceded that such a petition as is above described was not presented to the mayor and city council, there was no authority to charge up the cost of the improvement to the property owners and levy assessments for the payment of the same upon the lots abutting upon the street. The fact, however, that no such petition was presented did not render the order for paving the street void; the lack of such petition simply required the city itself to pay the cost of this improvement. It follows, therefore, that that portion of the decree of the district court in which it declared the tax for paving void and no charge upon the property of the appellees is right and should be affirmed.

2. The city contends, however, that the appellee, Wm. C. Orr, by the terms of the deed to his premises, assumed the payment of the paving tax in question herein, and is therefore estopped from contesting its validity; that as to him the decree is erroneous and should be reversed. The language of the deed, or the covenant in the deed, by which it is claimed the estoppel arises, is as follows: "I hereby covenant with the said Wm. C. Orr that the Anglo-

American Mortgage & Trust Company holds said premises by a good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever except a mortgage of \$5,000 by Theron C. Weaver; and all unpaid taxes and assessments which purchaser assumes and agrees to pay, and the said Anglo-American Mortgage & Trust Company agrees to warrant and defend the title against the claims and demands of all persons whomsoever except as above." It is urged by the city that this language brings Orr, the grantee, within the rule announced in several cases decided by this court where it has been held that the grantee in a deed who has deducted from the purchase price the amount of prior incumbrances, liens or assessments, and assumed to pay the same by the terms of his deed, is estopped from defending against such payment. The evidence in this case does not show that anything was ever deducted from the purchase price of the property on account of the assessments in question. Indeed, so far as the evidence shows anything in relation to the matter, it would seem that the full purchase price was paid by Orr for the premises described in his deed. The language used, and above quoted, certainly does not prevent Orr from defending against any of the assessments, which may have theretofore been levied upon the property which he purchased, which are illegal and void. Such language can only be held to refer to, and require the payment of, legal and valid assessments.

It is further contended that Orr is estopped by an admission made by him, or his attorney, upon the trial. At the close of the evidence Mr. Scott, who appeared for the city, made the following statement: "It is admitted that the witness, Wm. C. Orr, plaintiff, if present, would testify that at the time he bought the property owned by him in the paving district in question and assumed the payment of the special assessments involved in this action he did not know of the defects in the matter because of the absence of a petition for the paving by property

owners. Is that satisfactory? Mr. Smyth: Yes, that is all right." We can not agree with counsel for the city that this admission, as to what the witness, Orr, who is one of the plaintiffs, would testify to, is sufficient to estop him from asserting his right to have the illegal and void portion of the assessments upon his property canceled. This at most is only the statement of counsel, and that too of counsel for the city, as to what the witness, if present in court, would testify to. Certainly it can not be contended that such statement contains the necessary elements to constitute an estoppel. We hold, therefore, that he is not estopped, and has a right to have that portion of the taxes and assessments, to wit, the tax levied to pay for the paving, which is practically conceded by the city to be void, canceled and set aside. The decree, therefore, declaring the paving tax void as to him, is right and should be affirmed.

3. It is contended by the city that so much of the assessments and taxes as were necessary to pay for the curbing and guttering of the street within this paving district are valid, and that the decree should be so modified as to allow the city to collect the same. This question depends upon the construction of the last paragraph of the act above quoted. Section 69 gives full power to the mayor and council to pave, curb, gutter and otherwise improve any street within the city either with or without a petition therefor. It is provided, however, that curbing and guttering shall not be ordered or required to be laid on any street, avenue or alley not ordered to be paved except on a petition of a majority of the owners of the property abutting along the line of that portion of the street, alley or avenue to be curbed and guttered. It is clear from the reading of this paragraph that when a street, alley or avenue has been ordered paved, as was the street in question, the city council may order the same curbed and guttered without any petition therefor. There is no restraint upon the power of the city to charge the expense thereof to abutting property owners. No condition pre-

Stoddart v. American Nat. Bank of Omaha.

cedent, such as the presenting of a petition by the property owners, is required before the city can exercise its power to curb and gutter a street theretofore ordered to be paved.

In this case we are unable to determine from the record whether there were ever any assessments made upon the abutting property for curbing and guttering the street in question. So far as the evidence and this record shows there was but one assessment, which was for paving, the collection of which, we hold, was properly enjoined. If there ever was a proper and separate assessment to pay for the curbing and guttering the city should be allowed to proceed to collect it.

We therefore recommend that the decree herein be modified so that the city of Omaha, its treasurer and his successors in office, are forever restrained and enjoined from collecting the paving tax described and set forth in the plaintiff's petition; and that as to the curbing and guttering tax, if any such has been assessed or levied, separate and apart from the void paving tax herein enjoined, the injunction herein be dissolved and the city allowed to proceed to the collection of the same; that the decree of the district court, as thus modified, be affirmed.

POUND, C., concurs.

SO MODIFIED AND AFFIRMED.

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HENRY P. STODDART V. AMERICAN NATIONAL BANK OF  
OMAHA.

FILED APRIL 17, 1902. No. 11,181.

Commissioner's opinion. Department No. 1.

**Bills and Notes: PARTIES: INTERVENTION BY INDORSER: INSOLVENCY: ACTION AGAINST INDORSER.** An indorsee of notes secured by mortgage who has begun a suit for foreclosure upon them without making the indorser a party and who, while the suit is pending, transfers the notes to another party as collateral security, at the same time undertaking to complete the foreclosure, and who pro-



cures the dismissal of an intervention by the first indorser, in doing which he sets up the latter's insolvency, can not complain, in absence of any effort or request on his part for proceedings against his indorser, that the holder of the collateral brought none.

**ERROR** from the district court for Douglas county.  
**Tried** below before DICKINSON, J. *Affirmed.*

*Geo. G. Bowman*, for plaintiff in error.

*Howard B. Smith*, *contra.*

**HASTINGS, O.**

This action is a suit upon two promissory notes, brought by defendant in error, plaintiff below, hereafter called the plaintiff. Henry P. Stoddart, defendant below and plaintiff in error here, claimed a set-off on account of two promissory notes of \$1,333.33 given by one Martin Murphy to Dennis Cunningham, Thomas Brennan and Isaac S. Hascall, dated February 16, 1886, and due in two and three years respectively from that date. Stoddart alleged that these notes were indorsed by the payees and had been duly protested for non-payment and notice of dishonor given, and that the payees were liable as indorsers on these notes; that on July 8, 1892, they were turned over to plaintiff as collateral security for the payment of the two notes sued on, together with a mortgage deed securing their payment; that on April 18, 1892, defendant being then the owner of the notes and the mortgage securing them, had commenced a foreclosure upon them; that on July 8, 1892, the plaintiff received these notes and mortgage with full knowledge that they were in process of foreclosure, and ever thereafter retained the absolute possession and control of them; that on March 25, 1893, plaintiff intervened in the foreclosure action, setting out its rights and asking that from the proceeds of such foreclosure the defendant's notes to it be paid, and on June 30, 1893, recovered a decree against Murphy for the amount of its claim and a considerable sum in addition; that the indorsers of the Murphy notes were solvent at all times from July 8, 1892,

until October 1, 1894, and about that time became insolvent and have been ever since; that plaintiff neglected and refused, during the time from July 8, 1892, to August 1, 1894, to take any steps to collect said notes from the indorsers, and defendant's remedy against them became destroyed and his right of action against the indorsers on the collateral notes barred by the statute of limitations, to his damage in the sum of \$2,000. The plaintiff bank denied that the notes had been protested and notice given of dishonor; says that the foreclosure proceedings on the collateral notes had been commenced by defendant, Stoddart, in connection with William E. Healy and that Stoddart was substituted March 13, 1893, as sole plaintiff by reason of subsequently acquiring the sole ownership in the meantime; denies that it had the control of the notes except for the purpose of prosecuting the foreclosure action and denies the allegations as to the solvency of the indorsers and their becoming insolvent. At the trial the jury was instructed that there was due plaintiff bank on its notes against Stoddart \$1,704.04, with interest on \$1,600.30 of it at eight per cent. from June 26, 1894, and interest on \$103.74 of it at seven per cent. from February 27, 1893, each to be computed to October 3, 1898, for the amount of which verdict should be returned. The jury was instructed to find against the defendant on his counter-claim. A verdict was rendered for \$2,288. Motion for new trial on the ground that the court erred in giving the instruction, and for errors of law occurring at the trial, and because the verdict was not sustained by sufficient evidence, was overruled and judgment entered.

The only error now urged by defendant is that the trial court was wrong in instructing the jury to find against the defendant, Stoddart, as to his counter-claim. The bank has filed no brief.

Stoddart and Healy about the middle of March, 1892, obtained the notes from D. Cunningham. Stoddart testifies that at that time Cunningham indorsed one of the notes and that they were presented at once to Murphy, who

refused to pay them; that on the next day demand was made from Murphy for payment and refused and Cunningham at once informed. The latter replied that the notes were amply secured by real estate mortgage and was then told that the mortgage security would be exhausted, but he would be looked to for payment of any deficiency. This evidence was introduced over plaintiff's objection and does not seem to correspond to defendant's allegations. The latter were that the Murphy notes had been duly protested for non-payment and all the indorsers given notice of dishonor, and they had so become liable for the payment of the notes. The proof was, as above indicated, of a sale and indorsement after maturity by Cunningham alone and notice to him of a subsequent refusal to pay. The notes were secured by ten acres of land; the value of the security at the time that the collateral notes were transferred to the bank was estimated by the parties at \$1,000. The defendant, Stoddart, at that time was personally in charge, by his own statement, of the foreclosure proceedings and undertook to continue them; he states that he remained in control of the foreclosure proceedings until March, 1893, when the attorney for the bank commenced an intervention and from that time took charge of the bank's interest in the case. There is evidence that Cunningham in July, 1894, owed about \$40,000 and had about \$75,000 worth of property. There is evidence tending to show that McCague, the president of the bank, was told that payment of notes had been demanded of Murphy and Cunningham notified of the fact that Murphy had refused payment. Stoddart subsequently testified that he had no recollection of making any demand upon Cunningham for payment; he says that he told Mr. Cunningham that he and Mr. Healy had called at Mr. Murphy's house the evening before and asked the latter to pay the notes; that Murphy refused to pay them and said that he would pay them to Cunningham, but not to Stoddart and Healy, and Cunningham was then told that he would be looked to for payment of the notes; that Stoddart and Healy then com-

menced foreclosure of the mortgage and did not make Mr. Cunningham a defendant. Stoddart and Healy were attorneys for Cunningham at the time and continued to represent him in different matters until January 1, 1893. In 1893, Mr. Stoddart appears to have been acting as attorney for Mrs. Cunningham. It appears that the defendant, Stoddart, in following up the foreclosure action, begun by himself against Murphy, asked on June 12, 1893, for leave to amend his answer to the petition of intervention filed by Cunningham, and alleged that the latter was at the time of filing the petition for intervention and ever since had been and then was insolvent, and swore to his belief of the truth of such statements. Cunningham's intervening petition alleged that Stoddart and Healy's ownership of the notes was simply as collateral security for the payment of four notes of \$250 each and for the repayment of the sum of \$400 advanced to him, and asked that when the mortgage was foreclosed the whole amount of the mortgage above the sum of \$1,400 be paid to him, Cunningham. July 20, 1895, judgment for \$1,450.30 deficiency was rendered in favor of the plaintiff bank against Martin T. Murphy on account of these collateral notes in the foreclosure action.

It will be seen that the only question involved in this case is whether or not the defendant Stoddart had presented any proof sufficient to go to the jury of his set-off because of the failure on the part of the bank to collect from Cunningham. His claim consisted in the fact that on July 18, 1892, he had turned over to the bank two notes which were already, respectively, three and four years past due, on which he, himself, had commenced a foreclosure action without making any indorser a party, which action he continued to control for nine months thereafter without making the one indorser, as to whom he offered proof of notice of dishonor, a party, who had finally attempted to intervene and was prevented by the action of defendant, Stoddart, himself, from so doing, and in which action a deficiency judgment in favor of the bank was

finally entered. The evidence clearly discloses that litigation was carried on in the foreclosure action between Cunningham and Stoddart as to the latter's right to these notes and that Cunningham was finally dismissed out of that action at Stoddart's instance after he had gotten into it at his own.

The only proof tending to establish negligence on the part of the plaintiff bank is Stoddart's own testimony that he informed the bank's president that he had given notice to Cunningham immediately after demanding payment of Murphy that such payment was refused. The evidence discloses that in the litigation over the mortgage Stoddart was setting up that Cunningham was already insolvent in March, 1893, when the bank took out of Stoddart's hands the management of its interest in the controversy with Murphy and Cunningham over this mortgage.

It seems impossible, under the circumstances, to hold the bank responsible for any escape of Cunningham from liability for the deficiency judgment. It was entitled to know all of the facts relied upon to establish Cunningham's liability. It was surely not called upon to change the action begun by Stoddart, except on his demand. It would seem, also, that the bank was entitled to rely upon Stoddart's sworn statement made in that litigation that Cunningham was insolvent. It does not seem that Mr. Stoddart in the present action was entitled, on the evidence adduced, to urge any negligence on the part of the bank in not pursuing Cunningham. It follows that the court's instruction to find against him was right.

It is recommended that the judgment of the trial court be affirmed.

**DAY and KIRKPATRICK, CC., concur.**

**AFFIRMED.**

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY  
v. THE WESTERN HAY & GRAIN COMPANY.

FILED APRIL 17, 1902. No. 11,250.

Commissioner's opinion. Department No. 3.

**Railroads: SHIPMENT OVER OTHER LINES: LIMITING LIABILITY BY CONTRACT.** When a railway company receives goods for shipment to a point beyond the terminus of, or at a distance from, its own line, so that for a part of the distance they will require to be transported over the lines of other carriers, and collects the entire charge for transportation, it will be held to have assumed responsibility for safe carriage over every part of the route, and the liability so incurred can not be evaded or limited even by express contract. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463.

ERROR from the district court for Douglas county.  
Tried below before KEYSOR, J. *Affirmed.*

*M. A. Low and W. F. Evans*, for plaintiff in error.

In an interstate shipment the rights and liabilities of the parties must be governed by the laws of congress and the decisions of the federal courts. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S., 557. Such liabilities are discharged by one carrier upon delivery of the goods to another. *Pratt v. Railway Co.*, 95 U. S., 43; *The Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Sumner v. Walker*, 30 Fed. Rep., 261.

A station agent has no authority to bind his company for the transportation of freight of any kind beyond the end of the line of his company. *Grover & Baker Sewing Machine Co. v. Missouri P. R. Co.*, 70 Mo., 672; *Orr v. Chicago & A. R. Co.*, 21 Mo. App., 333; *Turner v. St. Louis & S. F. R. Co.*, 20 Mo. App., 632; *Hoffman v. Cumberland V. R. Co.*, 37 Atl. Rep. [Md.], 214; *Coates v. Chicago, M. & St. P. R. Co.*, 65 N. W. Rep. [S. Dak.], 1067.

*Clair & Coules*, contra.

A statute defining the obligation of carriers where goods are shipped to points beyond the terminus of the carrier's

Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.

line is not a regulation of interstate commerce, within the meaning of the constitution. *Richmond & A. R. Co. v. Patterson Tobacco Co.*, 169 U. S., 311; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S., 133; *Western Union Telegraph Co. v. Beals*, 56 Neb., 415; *Smith v. Alabama*, 124 U. S., 465; *Sherlock v. Alling*, 93 U. S., 99.

Any attempt to limit the liability of a common carrier under a thorough contract of shipment is invalid. *Eckles v. Missouri P. R. Co.*, 72 Mo. App., 296; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; Constitution of Nebraska, article xi, section 4; Compiled Statutes of Nebraska, 1899, chapter 16, section 111; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb., 70; *Union P. R. Co. v. Marston*, 30 Neb., 241; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *McDaniel v. Chicago & N. W. R. Co.*, 24 Ia., 417; *The Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Michigan C. R. Co. v. Myrick*, 107 U. S., 102.

#### AMES, C.

The plaintiff in error, a railroad company, received from the defendant in error at Walnut, Iowa, a quantity of merchandise which it undertook, by its shipping contract or bill of lading, "to transport over the line of this railroad to Western Hay & Grain Company, Fair Grounds, Omaha, Nebraska." But it was further recited in the paper that the property was to be delivered in good order to the next carrier if the same was to be forwarded beyond the line of the company's road to be carried to place of destination, "it being expressly agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered to such carrier." And there were other stipulations in the document to like effect, but the company received the entire amount of freight charges from the place of shipment to the point of destination, which involved carriage over the Union Pacific and Missouri Pacific lines. The plaintiff in error delivered the goods in due season and in good order to its connecting carrier the Union Pacific Company, at Omaha, Ne-

Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.

braska, after which they were lost or delayed, to the damage of the defendant, for which he sued and recovered a judgment, which it is sought to have reversed by this proceeding in error.

The only question in controversy is the construction of the foregoing contract. That is, whether the plaintiff in error is responsible for damages incurred after the goods left its own line and without fault on its own part. The receipt or bill of lading was not signed by the shipper or his consignee, and the above-mentioned stipulations are not shown to have been brought especially to the attention of either, nor is any particular carrier named to whom the goods were to be delivered by the plaintiff in error at Omaha. If the question were an open one in this state, the writer would find some difficulty in sustaining the judgment, but it appears to have been foreclosed by the decision of this court in *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463, 472. In that case it was held that a contract substantially like that under discussion was a contract to deliver goods, not to a connecting carrier but at destination, and that such a contract carried with it the common-law liability of a common carrier over the whole distance of transportation, and that such liability can not be limited even by the terms of an express contract. Discussing this proposition the opinion says:

"Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of this state is settled that a common carrier can not, even by the terms of an express contract, relieve itself of its common-law liability.

"It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivered the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing

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so through intermediate carriers, it assumed a liability of such character for every part of the route."

The decision referred to is not without support by judicial authorities elsewhere, but inasmuch as the point has been definitely decided by this court it is not deemed requisite to review or cite them.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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OMAHA LOAN & TRUST COMPANY, APPELLEE, v. ORINDA E. McCUMBER, APPELLANT, ET AL.

FILED APRIL 17, 1902. No. 11,307.

Commissioner's opinion. Department No. 3.

Judicial Sale.

APPEAL from the district court for Douglas county. Tried below before DICKINSON, J. *Affirmed.*

*F. A. Brogan*, for appellant.

*L. H. Kent*, contra.

AMES, C.

This is an appeal from an order of confirmation of a judicial sale of real property. No complaint is made by appellant except that in her opinion the property sold too low. It is unnecessary to cite authorities to the effect that such a complaint, standing alone, will not be considered by this court.

It is recommended that the judgment appealed from be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

PETERBORO SAVINGS BANK, APPELLEE, v. JAMES H. JOHNSON ET AL., APPELLANTS.

FILED APRIL 17, 1902. No. 11,377.

Commissioner's opinion. Department No. 3.

**Judicial Sale: OBJECTIONS TO CONFIRMATION: SUFFICIENCY.** Objections made to the confirmation of a sale examined, and held insufficient.

APPEAL from the district court for Douglas county. Tried below before SCOTT, J. *Affirmed.*

*L. D. Holmes*, for appellants.

*John W. Lytle*, contra.

DUFFIE, C.

This is an appeal from an order confirming a sale. The appellants present two objections for our consideration. W. H. Gates and W. G. Shriver were appointed by the sheriff to act with him in appraising the property. It is urged that as these parties were designated by the initials of their first or Christian names, that they were not properly named, and that the appraisement is, therefore, irregular. We do not think the objection is well taken. There is nothing in the record to show that the names by which the appraisers were designated were not the full and true names of the parties. In *German Insurance Company v. Frederick*, 57 Neb., 538, objection was made because the summons was returned as served on "H. L. Bode" relating to which this court said: "Finally, the objection that there is no such person as H. L. Bode is based on the theory that it is a designation of a person by initials, and not by his Christian and surname. Possibly the objection to the return might have been good if it had been shown, after the manner of a plea in abatement, that 'H. L. Bode' was not the true name, and also what the true name was. But this court has held that in the absence of such showing it can not be presumed that the initials do

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not express the full name. *Oakley v. Pegler*, 30 Neb., 628; *Scarborough v. Myrick*, 47 Neb., 794."

The further objection is made that the court did not in the decree judicially determine and adjudge that the property should be sold. The court in its decree directed that an order of sale should issue to the sheriff "commanding him to duly appraise, advertise and sell said property as upon execution, and report his proceedings to this court for further orders." We think that this is sufficient to authorize the sale made, and we recommend that the order appealed from be affirmed.

AMES and ALBERT, CC., concur.

AFFIRMED.

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THE CHESHIRE PROVIDENT INSTITUTION, APPELLEE, v.  
MARTHA I. COURTNEY ET AL., APPELLANTS.

FILED APRIL 17, 1902. No. 11,454.

Commissioner's opinion. Department No. 3.

Principal and Agent.

APPEAL from the district court for Furnas county.  
Tried below before NORRIS, J. *Reversed and dismissed.*

D. G. Courtney, for appellants.

A. E. Harvey, contra.

AMES, C.

The facts in this case are conceded by counsel to be in all essential particulars the same as in the cases of the *Cheshire Provident Institution v. Gibson*, ante, page 392. 89 N. W. Rep., 243, and *Cheshire Provident Institution v. Feusner*, 63 Neb., 682, 88 N. W. Rep., 849. Under the authority of those decisions it is recommended that the judgment of the district court be reversed and the action dismissed.

ALBERT and DUFFIE, CC., concur.

REVERSED AND DISMISSED.

COLUMBIA NATIONAL BANK, APPELLANT, v. WHITNEY J.  
MARSHALL ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,458.

Commissioner's opinion. Department No. 1.

**Mortgages: SATISFACTION AFTER ASSIGNMENT: NOTICE TO SUBSEQUENT MORTGAGEE OR PURCHASER.** A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized. *Whipple v. Fowler*, 41 Neb., 675, followed.

APPEAL from the district court for Lancaster county.  
Tried below before HOLMES, J. *Affirmed.*

*John S. Bishop*, for appellant.

*W. F. Evans, L. W. Billingsley and R. J. Greene*, contra.

DAY, C.

The plaintiff brought this action to foreclose a mortgage executed by W. J. Marshall and wife to Ada B. Teeter, upon certain lands in Lancaster county, to secure the payment of six promissory notes maturing upon different dates, aggregating the sum of \$6,500. The last one of these notes was for \$1,500 and fell due January 12, 1892. This note was sold and transferred by Ada B. Teeter to the plaintiff, and constitutes the basis for the foreclosure action. The Chicago, Rock Island & Pacific Railway Company, one of the defendants named in the action, filed an answer, alleging that it was an innocent purchaser of a part of the premises sought to be foreclosed, having acquired title thereto by a deed of general warranty from W. J. Marshall and wife, who were the owners of said real estate. Other cross-petitions were filed, but as the controversy in this case is between the plaintiff and the railway

company, the other interests will not be considered. Upon the trial the court rendered a decree of foreclosure in favor of the plaintiff as prayed, except as to the portion of the lands embraced in the deed from Marshall to the railway company. As to that portion of the land the court denied a foreclosure. From this judgment the plaintiff has appealed to this court.

The case was tried upon a stipulation of facts which may be summarized thus: On January 12, 1887, W. J. Marshall and wife executed and delivered to Ada B. Teeter a mortgage upon certain real estate situated in Lancaster county to secure the payment of six promissory notes, aggregating the sum of \$6,500. These notes matured at different dates, the last one being for \$1,500, falling due January 12, 1892. On February 27, 1891, Ada B. Teeter sold and transferred the note of \$1,500 above mentioned to the plaintiff herein, who ever since that time has been the owner and holder thereof. No assignment of the mortgage to plaintiff was ever placed on record. On January 12, 1892, when said note became due, the time of payment was by agreement between the plaintiff and the maker thereof extended to January 12, 1894, but no extension of the mortgage was placed of record. On March 1, 1892, Ada B. Teeter, for a valuable consideration, executed a release of the mortgage to Marshall, releasing a part of the lands from the lien of the mortgage. The lands thus released included the tract embraced in the defendant's right of way. This release was duly filed for record on March 1, at 3 o'clock P. M. On March 1, 1892, W. J. Marshall and wife, by deed of general warranty, conveyed to the Chicago, Rock Island & Pacific Railway Company that portion of the premises included within the above release, being a strip of land constituting the defendant's right of way, a specific description of which it is unnecessary to here set out. There is nothing in the stipulation of facts upon which the case was tried showing what time during the day of March 1, the deed from Marshall to the railway company was executed. It was, however, filed for

record at 4 o'clock P. M. of said day. The stipulation of facts also shows that the sale and conveyance of the real estate to the railway company and the release of the mortgage was made in good faith, and without any notice or knowledge on the part of the railway company that the plaintiff had or claimed to have any interest in said mortgage or any of the notes referred to therein.

From the pleadings and the stipulation it seems clear to us that the railway company was an innocent purchaser, for full value, buying from the owners of the land at a time when the release of the mortgage from the original mortgagee to the mortgagor was recorded in the office of the register of deeds, presumably relying upon the record and without notice or knowledge that the debt had been assigned or was unpaid or that the release was unauthorized.

We think the facts of this case bring it clearly within the rule announced in *Whipple v. Fowler*, 41 Neb., 675, wherein it was held that "satisfaction entered on the record of a mortgage by a mortgagee, after he had sold and delivered the note secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized."

In *Cram v. Cotrell*, 48 Neb., 646, it was held that "Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee." The same rule has been reaffirmed in *Porter v. Ourada*, 51 Neb., 510; *Perry v. Baker*, 61 Neb., 841, 86 N. W. Rep., 692.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

ISABEL P. CUSHMAN, APPELLEE, v. SARAH G. TAYLOR ET AL.,  
APPELLANTS.

FILED APRIL 17, 1902. No. 11,459.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure. TAXATION: CERTIFICATE OF TAX SALE AND SUBSEQUENT TAXES.** Under the provisions of section 179, article 1, chapter 77, Compiled Statutes, 1899, a certificate of tax sale, together with prior and subsequent taxes paid, constitute a single cause of action.
2. **Mortgage Foreclosure: DEDUCTION OF TAX LIENS: PRIORITY.** By the terms of section 138, article 1, chapter 77, Compiled Statutes, 1899, taxes upon real estate are a lien thereon from and including the first day of April in the year in which they are levied, until the same are paid.

APPEAL from the district court for Sherman county.  
Tried below before SULLIVAN, J. *Affirmed.*

*Wall & Williams*, for appellants.

*H. M. Mathew*, contra.

KIRKPATRICK, C.

This is an appeal from an order of confirmation made by the district court for Sherman county. The only objection urged against the correctness of the order of the trial court is that the county treasurer improperly included in his certificate of liens made at the request of the sheriff the taxes on the land in controversy for the year 1898. Appellants complain that the application made by the sheriff to the county treasurer for the certificate of liens contained a request for all liens as shown by the records in his office, rather than a request for such liens as were prior in point of time to the lien of the decree; and it is further contended that appellants were prejudiced by reason of the fact that the county treasurer in his certificate of liens did not give the amount of taxes for each year separately, but gave the same in gross. That portion of

the county treasurer's certificate material to be considered is as follows: "In accordance with above application, I find the following incumbrances, to wit: Sold for 1895 and 1896 taxes, 1897 and 1898 paid as subsequent; amount necessary to redeem, \$136.30." This amount was deducted by the sheriff and appraisers from the total value of the premises, and the property was sold for a little above two-thirds of the remainder, after making such deduction, and the property did not bring two-thirds of the gross appraised value.

From this certificate of the treasurer it appears that the land had been sold for taxes for the years 1895 and 1896, and that the purchaser had paid the subsequent taxes for the years 1897 and 1898. By the terms of section 179, chapter 77, Compiled Statutes, 1899, it is provided that the certificate of sale, together with prior and subsequent taxes paid thereon, constitute one cause of action. It therefore follows that the action of the treasurer was correct in including the taxes for the four years in gross as he did.

Again, it is contended that the taxes for the year 1898 were not a prior lien to the lien of the decree, within the provisions of the statute authorizing the appraisers to deduct prior liens. By the terms of section 138, article 1, chapter 77, Compiled Statutes, 1899, taxes upon real estate are a lien thereon from and including the first day of April in the year in which they are levied until the same are paid. The decree of foreclosure in this case was entered on May 16, 1898. From this it is apparent that the taxes for the year 1898 were a prior lien to that of the decree and were properly deducted.

It is apparent from the record that appellants have been in no way prejudiced by the action of the trial court in confirming the sale. It is therefore recommended that the order of the trial court be affirmed.

HASTINGS and DAX, CC., concur.

AFFIRMED.



P. H. PETERSON ET AL. V. JAMES E. MANNIX.

FILED APRIL 17, 1902. No. 11,467.

Commissioner's opinion. Department No. 2.

**Interest: ALLEGATION IN PLEADING.** No express allegation that interest is due is required to enable a plaintiff to recover interest upon a debt or claim which, without any contract therefor, bears interest as a matter of law.

**ERROR** from the district court for Pierce county. Tried below before ALLEN, J. *Affirmed.*

*O. J. Frost*, for plaintiffs in error.

*Geo. T. Kelley* and *M. H. Leamy*, contra.

**POUND, C.**

This action was brought originally in justice's court to recover \$17.80, on an account for job printing, advertising and subscription to a newspaper, amounting to \$5.80, and a further claim for \$12 assigned to plaintiffs by one Ella Frost. The defendant offered in writing to confess judgment for \$1.50. Two trials were had to a jury in justice's court before a verdict and judgment could be had. Error was then prosecuted to the district court, where the judgment rendered by the justice of the peace was reversed, the cause retained for trial and again tried to a jury. This trial resulted in a verdict and judgment in plaintiffs' favor for \$1.50, from which error is now prosecuted.

The assignments of error chiefly relied on relate to an order of the district court striking certain allegations as to interest out of the petition. The allegations in question set up that eighteen cents interest was due upon one item sued on and ten cents interest upon another. This sum of twenty-eight cents, which the plaintiffs maintain they were entitled to by way of interest, comes about as near to the "little diachylon," which, according to Lord

Holt, the common law will duly save to parties litigant, as could well be anticipated in a cause tried to three juries and of sufficient interest to the parties to justify bringing to this court. But the constitution has solemnly promised that the right to be heard in the supreme court by error or appeal shall not be denied, and, so long as anything is in controversy, it is our duty to wrestle with the questions of law presented without regard to mere accidents of substance or value. Approaching these assignments of error, therefore, with due gravity and a high sense of the importance of the principle involved, we are of opinion that the rulings complained of were without prejudice. Interest was not claimed by virtue of any contract or agreement to pay it, but by reason of section 4, chapter 44, Compiled Statutes. Hence we do not understand that any express allegations that interest was due were required. A plaintiff may recover interest upon debts or claims which, without any contract therefor, bear interest as a matter of law, under sufficient allegations of such debts or claims and prayer for the amount thereof and interest. The recovery can not exceed the amount prayed for, but, within that sum, it may include interest in such cases without any allegation that it is due. 11 Ency. Pl. & Pr., 435.

The defendant's answer admitted that \$1.50 was due on two items set up in the petition, and it is next argued that this is an admission that \$1.50 and interest thereon was owing and that the judgment is contrary to law, in that it is twenty-eight cents less than the pleadings require. Upon due reflection and the mature consideration of this important question which the constitution of the state requires us to make, we think otherwise. One of the items in question was for job-printing alleged to have been reasonably worth the sum of fifty cents. On that item and another of \$1 the defendant admitted that \$1.50 was due. This does not admit that the item of job-printing was reasonably worth the full sum alleged, and may well include interest on the item of \$1 and whatever sum was owing on

the other. The trial court instructed as to interest, and, for aught that appears, plaintiffs have duly recovered it. *Everett v. Hobleman*, 15 Neb., 376.

Other assignments of error argued relate to certain rulings on evidence, to the judgment as to costs, and to the sufficiency of the evidence upon an item of \$4. The rulings on evidence were right as the pleadings stood, and, if the court erred in denying an application to amend the petition in such way as to make the evidence offered admissible, an assignment to that effect should have been included in the petition in error. The judgment as to costs is not prejudicially erroneous because the record shows that an offer in writing to confess judgment, for the amount found due after three trials, was made prior to the first trial in the justice's court. Plaintiffs escaped with an adverse judgment for half the costs only, and we think they ought to remember Sancho Panza's admonition to "thank God and the giver and not look the gift horse in the mouth." As to the item of \$4, the evidence is conflicting and there is enough competent testimony to sustain the verdict.

We have endeavored to pass upon the several assignments of error in detail with circumspection and with no unseemly haste or brevity. In our opinion, the constitutional rights of the plaintiffs to be heard in this court have been duly vindicated, and we recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

AFFIRMED.

**WILLIAM K. POTTER, RECEIVER FOR OMAHA LOAN & TRUST  
COMPANY, APPELLEE, V. JOSEPH B. LYNCH ET AL., AP-  
PELLANTS.**

FILED APRIL 17, 1902. No. 11,516.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: OBJECTIONS TO APPRAISAL: WHEN FILED.** Objections to appraisement of lands on foreclosure should be filed before sale is held.
2. **Mortgage Foreclosure: SALE IN GROSS: PRESUMPTIONS.** Selling 200 acres of land in gross, where it is one farm occupied as a whole by a single defendant, will not be presumed erroneous.
3. **Mortgage Foreclosure: PUBLICATION OF NOTICE OF SALE.** Publication of notice of sale in each issue of a semi-weekly paper for thirty days is a sufficient compliance with the statutory requirements in that respect.

APPEAL from the district court for Buffalo county.  
Tried below before SULLIVAN, J. *Affirmed.*

*J. M. Easterling*, for appellants.

*William Gaslin and E. H. Scott*, contra.

HASTINGS, C.

This is an appeal from an order confirming a foreclosure sale. A number of objections are made to the confirmation of the sale on the ground of various defects in the appraisement. The sale, however, was held on October 24, 1899, and the objections were only filed on November 24, following. The objections to the appraisement, therefore, can not be considered. *Vought v. Foxworthy*, 38 Neb., 790.

One objection is that the lands in controversy were not offered for sale in government subdivisions but were offered as a whole; and another, that no notice of sale was published as required by law. That the first publication was on September 21, which was Thursday, the last one on October 23 and but three complete weekly publications

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were made, the paper being a semi-weekly one. An objection is made that no decree was entered upon certain answers filed in the case. It is not contended that errors in the decree can be corrected in this proceeding. It will only be necessary, therefore, to consider the objection to the sale of the land as a whole and to the publication of the notice.

So far as the first objection is concerned it appears that these 200 acres consisted of one farm, with one set of buildings, occupied by defendant as a whole. The action of the sheriff in selling it as a whole seems to have been regular and correct. *Eaton v. Ryan*, 5 Neb., 47; *Craig v. Stevenson*, 15 Neb., 362; *Iowa Loan & Trust Company v. Devall*, 63 Neb., 826.

No proof was introduced as to the notice except the affidavit of publication. The affiant swears that she is publisher of the *Kearney Hub*, a semi-weekly paper published in Buffalo county, Nebraska, and of general circulation therein, and that this notice was published for more than thirty days in every issue of said paper in each week commencing on the 21st of September, 1899. This affidavit was filed October 24 and indicates a compliance with the law, as does also the sheriff's return.

It is recommended that the order confirming the sale be affirmed.

DAY and KIRKPATRICK, CC., concur.

AFFIRMED.

LEA G. HEDBLOOM, APPELLANT, V. ELLA PIERSON ET AL.,  
APPELLEES.

FILED APRIL 17, 1902. No. 11,542.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: GENERAL DENIAL: "NO ACTION AT LAW": BURDEN OF PROOF.** In a suit to foreclose a real estate mortgage in which a general denial is filed the burden is upon plaintiff to make a *prima facie* showing that no action at law has been instituted for the collection of the debt.

2. **Mortgages: ACKNOWLEDGMENT TAKEN BY OWNER OF NOTE: PUBLIC POLICY.** On the grounds of public policy an officer is disqualified from taking the acknowledgment of a mortgage given to secure an indebtedness, evidenced by a note, of which he is the real owner.
3. **Mortgages: HOMESTEAD: ACKNOWLEDGMENT BY HUSBAND AND WIFE: VALIDITY.** A mortgage executed on the homestead of the grantors is absolutely void unless acknowledged by both husband and wife.

APPEAL from the district court for Polk county. Tried below before SORNBORGER, J. *Affirmed.*

*John Tongue*, for appellant.

*King & Bittner*, contra.

OLDHAM, C.

This was an action to foreclose a real estate mortgage on two town lots in Stromsburg, Nebraska. The mortgage was given to secure the payment of a note of \$31.25 given by defendant, Ole Pierson, to Lea Hedbloom. Each of the defendants answered the petition, denying the execution and delivery of the mortgage. Ella Pierson pleaded fraud in procuring her signature, and also alleged that the acknowledgment of the mortgage was taken before A. B. Hedbloom, who was the real owner of the note, and that the mortgaged premises was her homestead. There was trial to the court on issues thus joined and judgment for the defendants, and plaintiff appeals.

Plaintiff's petition contained the allegation "that no suit at law or other proceedings have been had for the recovery of the debt secured by the mortgage," and no evidence of any kind was introduced tending to prove this allegation, which had been properly put in issue by the general denials contained in the answers of each of the defendants. Under the rule firmly established by the adjudications of this court, on this ground alone, the judgment of the district court would necessarily be affirmed.

There was also a square conflict of testimony as to whether defendant, Ella Pierson, ever knowingly signed a mortgage of any kind on the premises in controversy.

She testified that when she signed the paper it was in blank and that A. B. Hedbloom, husband of plaintiff, who took her acknowledgment, represented to her that it was a paper necessary to be signed to effect an exchange of property which defendants were making, and in which A. B. Hedbloom was acting as defendants' agent. There was also evidence clearly and undisputably showing that A. B. Hedbloom was the real owner of the note in controversy; that he was taking it in payment of his services for effecting a trade of the property then owned and occupied by the defendants for the property in controversy. The evidence showed that the defendants were simply exchanging one homestead for another which they intended at the time to, and subsequently did, occupy as a homestead.

In *Horbach v. Tyrrell*, 48 Neb., 514, 67 N. W. Rep., 485, this court in discussing the question as to what interest will disqualify an officer from taking an acknowledgment in a particular case, says: "Whether such disqualification exists in any case must be determined from the particular facts and circumstances of that case. No statute exists in this state which prescribes what relationship or interest of an officer shall disqualify him from taking an acknowledgment in any given case; but it would seem that on grounds of public policy an officer should be disqualified from taking an acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made which he acknowledged. And perhaps it may be said, as a very general proposition, that an officer who is a party to a conveyance or interested therein is disqualified from taking the acknowledgment of the grantor."

We think that under this rule that A. B. Hedbloom, being the real party in interest, in the indebtedness secured by the mortgage, was clearly disqualified from taking the acknowledgment of the mortgage, and we do not think that he could qualify himself for this purpose by resorting to the subterfuge of inserting his wife's name in the note as payee. It would then follow that the mortgage, being

a conveyance of the homestead and not having been legally acknowledged by both husband and wife, was and is absolutely void.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

**AFFIRMED.**

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**LUDWIG BOCK v. NEWTON J. GROOMS.**

FILED APRIL 17, 1902. No. 11,544.

Commissioner's opinion. Department No. 3.

**Appeal and Error: FINAL ORDER.** To entitle a party to a review there must have been a final order rendered in the cause. *Reynolds v. City of Tecumseh*, 48 Neb., 785.

**ERROR** from the district court for Cherry county. Tried below before HARRINGTON, J. *Petition in error dismissed.*

*A. W. Scattergood and M. P. Kinkaid*, for plaintiff in error.

*Clarke & Tucker and A. M. Morrissey*, contra.

DUFFIE, C.

The transcript furnished by the clerk in this case shows the pleadings, the instructions given and refused, the verdict of the jury, and the motion for a new trial. The ruling of the court on the motion for a new trial is not shown, nor does it appear that any final judgment in the case has been entered. In this condition of the record we have no jurisdiction to review the case and we therefore recommend that the petition in error be dismissed.

AMES and ALBERT, CC., concur.

**PETITION IN ERROR DISMISSED.**

**NOTE.**—The judgment of dismissal in the foregoing case was, on motion, set aside by the court May 21, 1902, a rehearing allowed, and final opinion filed November 19, 1902. The opinion on the merits follows.—**REPORTER.**



Bock v. Grooms.

## LUDWIG BOCK V. NEWTON J. GROOMS.

FILED NOVEMBER 19, 1902. No. 11,544.

Commissioner's opinion. Department No. 3.

1. **Fires: DAMAGES: RULE IN ABSENCE OF NEGLIGENCE.** One may lawfully kindle a fire on his own land for the purpose of husbandry, and he will not be liable for damage caused by such fire to the property of third parties, in the absence of negligence in kindling the same or in not keeping it confined to his own premises.
2. **Fires: EXERCISING ORDINARY CARE AND CAUTION: WHIRLWINDS.** A party who kindles a fire on his own land can not be charged with negligence in not guarding against a whirlwind or extraordinary high winds which may ensue and carry the fire beyond his control, if, before setting it, he took such precautions as a man of ordinary caution would exercise to confine it to his own premises, and exercised the same care and watchfulness to prevent its escape while burning.

FINAL opinion after prior order dismissing the petition in error had been set aside. Former opinion reported *ante*, page 802.

ERROR from the district court for Cherry county. Tried below before HARRINGTON, J. *Judgment below reversed.*

*A. W. Scattergood and M. P. Kinkaid*, for plaintiff in error.

*Clarke & Tucker and A. M. Morrissey*, *contra*.

DUFFIE, C.

By the judgment of the district court for Cherry county the plaintiff in error was held for damages sustained by the defendant in error caused by a fire which it is alleged plaintiff in error kindled on his own premises and negligently permitted to escape and burn over a large extent of country, finally consuming a large amount of the defendant's property. There appears to be no dispute that the fire which caused the injury was the one set by the plaintiff in error, or a back fire set out by neighbors to

protect their own property against the one kindled by the plaintiff.

In the view which we take of the case, the source of the fire is immaterial, as the judgment must be reversed on account of error in the sixth instruction given by the court on its own motion in the following words: "The jury are instructed by the court that if you find from the evidence that the fire set out by the defendant would not have escaped from him except for the occurrence of a whirlwind, then your verdict should be for the defendant, unless you find from the evidence that whirlwinds are of frequent occurrence in that vicinity."

The early rule of the common law was very harsh in its dealing with those who started a fire by which the property of another was injured or destroyed, and went almost to the extent of making them absolutely liable for all damages caused thereby. This rule was modified by the statute of 6 Anne, 31, which provided that no action should be maintained against any person in whose house or chambers any fire should accidentally begin or any recompense be made by him for any damages occasioned thereby. This exemption from liability was further extended by 12 George III., chapter 73, and 14 George III., chapter 78, to fires which originate in a stable, barn or other building or on the estate. Whether or not the statute extended to cases of negligence was for some time a disputed question, but it was finally settled that the statute does not extend its protection to any fires which are negligently or knowingly kindled. *Filliter v. Phippard*, 11 Q. B., 347.

In this country, with few exceptions, the rule has always prevailed that one may lawfully kindle a fire on his own premises for purposes of husbandry, and that he does not become liable for injury caused by it to the property of another, in the absence of negligence in its management. *Calkins v. Barger*, 44 Barb. [N. Y.], 424; *Clark v. Foot*, 8 Johns. [N. Y.], 421; *Fahn v. Reichart*, 8 Wis., 225; *Miller v. Martin*, 16 Mo., 508; *Hanlon v. Ingram*, 3 Ia., 81; *Sweeney*

*v. Merrill*, 38 Kan., 216. This being the rule, we are of the opinion that one who kindles a fire on his own land is not bound to anticipate and guard against a "whirlwind" or any extraordinary high winds that may ensue, and such is the holding in several well considered cases in other states. *Sweeney v. Merrill*, 38 Kan., 216; *Miller v. Martin*, 16 Mo., 508; *Stuart v. Hawley*, 22 Barb. [N. Y.], 619; *Averitt v. Murrell*, 4 Jones, Law [N. Car.], 323.

A considerable part of the brief of the plaintiff in error is devoted to a discussion of what is claimed to be the real issue in the case. It is said in effect that the only negligence charged against him is that he "negligently and carelessly permitted the fire to escape," and that there is no allegation in the petition charging that the plaintiff negligently set out the fire. To our minds the difference is one of phraseology only. One who sets out a fire on his own premises without taking such precautions as a reasonable man should to prevent it from spreading to his neighbor's premises is chargeable with negligence in permitting the fire to escape, in the same legal sense as if he had made all necessary precautions to confine it in the first instance, but allowed it to get beyond his control because of want of care and watchful attention during the time it was burning. In one case it escaped because of want of proper precautions before setting it out; in the other, because of want of care in watching and controlling it; in both cases he carelessly and negligently allowed it to escape.

The jury should have been told that if the defendant, before setting the fire, took such precautions as a man of ordinary prudence and caution would exercise to prevent it spreading from his own premises, and after setting it used such care and watchfulness as a man of ordinary prudence and caution would to prevent its spread to neighboring lands, that in such event he would not be liable for damage in case the fire was carried beyond his control by a whirlwind, or any wind of an extraordinary or unusual character.

For error in giving the sixth instruction we recommend a reversal of the judgment.

AMES and ALBERT, CC., concur.

REVERSED AND REMANDED.

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OMAHA LOAN & TRUST COMPANY, APPELLEE, v. MARY  
WALENZ ET AL, APPELLANTS.

FILED APRIL 17, 1902. No. 11,552.

Commissioner's opinion. Department No. 2.

**Judicial Sale: OBJECTION OF FRAUD IN APPRAISAL: VALUE.** Where the sole evidence in support of a motion to vacate an appraisement of real property for judicial sale on the ground of fraud relates to the value of the property, such appraisement will not be set aside unless it is so clearly shown to be grossly inadequate as to compel the conclusion that it is fraudulent.

APPEAL from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

*William H. Crow and L. F. Hale, for appellants.*

*F. A. Brogan, contra.*

POUND, C.

It is thoroughly settled that the appraisers, not the court, are to fix the value of real property about to be sold under process of a court, for the purposes of such sale. They act judicially, and their determination is to be impeached only for fraud. If we were determining the value of the property here in question upon a mere issue of value, we might be required to weigh more carefully the mass of testimony presented. But the sole question is whether the appraisement complained of was fraudulent. In support of their case appellants have adduced evidence as to value only. A number of witnesses, who appear to be credible and well-informed, and were believed by the

trial court, agree with the appraisers. Unless the appraisal is so clearly shown to be grossly inadequate as to compel the conclusion that it is fraudulent, it must stand. There is no reason to think the determination of the appraisers fraudulent when other competent judges of values concur therein.

It is recommended that the order appealed from be affirmed.

BARNES and OLDHAM, CO., concur.

**AFFIRMED.**

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**N. R. PERSINGER ET AL. V. CHRISTIAN H. MILLER.**

**FILED APRIL 17, 1902. No. 11,568.**

**Commissioner's opinion. Department No. 2.**

- 1. Intoxicating Liquors: OBJECTIONS NOT IN REMONSTRANCE URGED FIRST IN DISTRICT COURT.** Objections not set forth in the remonstrance to an application for license to sell intoxicating liquors, and not urged on the hearing before the licensing board, should not be considered in the hearing on appeal in the district court, and will not be considered on a petition in error to this court.
- 2. Intoxicating Liquors: AMENDING RECORD IN DISTRICT COURT.** Where, on the hearing in the district court, it is found that for any reason a portion of the record and proceedings before the licensing board has not been sent up either in the transcript or bill of exceptions, it is proper for the court, upon an application therefor, to order the same brought up and filed in the case.
- 3. Intoxicating Liquors: QUALIFICATIONS OF SIGNERS OF APPLICATION: FINDINGS OF FACT ON APPEAL.** Where the question of fact, as to the qualifications of certain signers to an application for a license to sell intoxicating liquors, has been passed upon by the licensing board, and the district court, in a hearing on appeal from the judgment and order of such board based in part on such finding of fact, has examined the evidence and record and arrived at the same conclusion, such finding of fact and order of the board will not be disturbed on the hearing of a petition in error in this court unless clearly wrong. *Waugh v. Graham*, 47 Neb., 153, approved and followed.

**ERROR** from the district court for Merrick county. Tried below before GRIMISON, J. *Affirmed.*

*John Patterson, for plaintiffs in error.*

*J. W. Sparks, contra.*

**BARNES, C.**

This case comes here on a petition in error from the judgment of the district court for Merrick county affirming the findings and judgment of the city council granting a license to one Christian H. Miller to sell malt, spirituous and vinous liquors, intoxicating drink, in the third ward of Central City for the year 1900.

It appears from the transcript that Christian H. Miller filed an application for a license to sell intoxicating liquors in the third ward of Central City, Merrick county, Nebraska, on the 6th day of June, 1900; that notice of the application was published in one of the newspapers of that city, and that a remonstrance, containing several grounds, was filed by the plaintiffs in error to the granting of the license. A hearing was had, and the board overruled the remonstrance and granted the license. From this ruling and judgment the remonstrators appealed to the district court, and on the 9th day of July, 1900, the court being then in session, the appeal was taken up, and after a hearing thereon the court affirmed the judgment and orders of the city council. The remonstrators thereupon brought the case to this court by a petition in error. Many assignments of error are set forth in the petition, but in the plaintiffs' brief only three of them are urged upon the attention of the court; and therefore, under the well established rule, all the other assignments will be considered waived.

1. The plaintiffs allege that the court erred in affirming the order of the city council, because the license was granted without any bond being approved by that body. No such ground appears in the remonstrance filed with the council, and the record shows that on the original hearing the case was treated as though a proper bond had been filed. Therefore this objection could not be urged on the

appeal in the district court. It further appears by the transcript that the council found that the applicant had complied with all the requirements of the law, and was entitled to a license. This established, *prima facie*, that there was a bond filed and approved, and unless that question was raised in the trial court, and some showing made to the contrary, it must be assumed here that such bond was given and approved, and the judgment of the court, so far as that contention is concerned, must be affirmed.

2. It is next contended that the court erred in allowing the affidavit of the publisher of the newspaper, in which the notice of the application for the license to sell intoxicating liquors was published, showing such publication, to be brought up from the city clerk's office and filed in the case at the time of the hearing on the appeal. We can not agree with the plaintiffs on this proposition. The transcript showed that the applicant had complied with the law, and that the proof of publication of the notice had been filed with the clerk; therefore it must have been before the board at the hearing. When it was ascertained that it was not sent up to the district court, either in the transcript or by way of the bill of exceptions, the court very properly ordered it to be brought up and filed in the case. Such action was equivalent to the order often made by this court on a suggestion of a diminution of the record.

3. The plaintiffs allege that the court erred in sustaining the judgment and order of the council, because the petition of the applicant was not signed by thirty *bona fide* resident freeholders of the third ward of the city; that it was the duty of the applicant to establish that fact by competent evidence. We fully agree with this statement so far as it relates to the duty of the applicant. It appears, however, from the record that the remonstrators specifically challenged the qualifications of certain of the signers to the application, naming them; that upon the hearing evidence was introduced by the applicant tending to show that such persons were qualified signers of his petition, and such evidence was not disputed by the remon-

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strators. The district court, upon consideration of this evidence, found that it was sufficient, and sustained the order and judgment of the city council made thereon.

We are unable to say that the finding of the learned judge of the district court was clearly wrong, and therefore his judgment should be sustained. In *Waugh v. Graham*, 47 Neb., 153, it is said that "Where questions of fact have been determined by the body authorized to pass upon applications for licenses to sell intoxicating liquors, and also by the district court, to which an appeal has been taken from the decision of the licensing body, and the findings or conclusions agree, they will not be disturbed in error proceedings to this court, unless manifestly wrong."

We think the case at bar falls clearly within this rule, and we therefore recommend that the judgment of the district court be affirmed.

POUND and OLDHAM, CC., concur.

AFFIRMED.

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MARY BEAN, APPELLANT, v. THE PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION, APPELLEE.

FILED APRIL 17, 1902. No. 11,578.


Commissioner's opinion. Department No. 3.

**Usury:** TO WHOM AVAILABLE AS DEFENSE WHEN SEPARABLE FROM INTEREST AGREEMENT. Although usury is a personal defense not available to another than a party to the contract, yet in an instance in which the contract for usury is separable and separate from the agreement to pay interest it is non-enforceable against any person.

APPEAL from the district court for Fillmore county. Tried below before STUBBS, J. *Reversed with directions.*

*J. H. Sterling*, for appellant.

*Chas. H. & Frank W. Sloan*, contra.





## AMES, C.

In February, 1891, Sanford Williams procured from the appellee, The People's Building, Loan & Savings Association, a New York corporation, a loan of \$540. In consideration of the loan he executed a mortgage for \$600 to the association upon certain lands in Fillmore county, this state, and agreed to pay certain fixed dues and assessments, not necessary to be particularly mentioned here. The transaction is such as has been repeatedly held by this court to be usurious when engaged in by a corporation not organized under the laws of this state. Some years after the mortgage had been made of record in the county the lands came by *mesne* conveyances to the appellant, Mary Bean, who is still the owner of them. She and her predecessors in the title made continuous monthly payments of interest and dues to the association from the date of the mortgage until the aggregate of the sums so paid was \$974.20, exceeding in amount the money obtained by the loan, together with ten per cent. annual interest thereon, the highest rate permitted by law except to domestic loan associations. Thereupon the plaintiff begun this action, seeking a satisfaction of the mortgage and a cancellation of it of record. The answer sets out in full the instruments complained of in the petition and prays that "if the court should find the original contract made between the defendant and said Williams is not enforceable, then, in any event, the court will find the defendant is entitled to legal interest, to wit, seven per cent. on all moneys furnished the said Williams," and that if there should be found any excess of the same over the amount paid, the defendant have a decree of foreclosure and sale of the mortgaged premises for the satisfaction of the same. It was denied that the contract was usurious, and objected that if it had been so, the plaintiff, not being a party to it, could not avail herself of that fact as a defense. The court found that the transaction was not usurious, and that there was due the defendant thereon the sum of \$274.74.

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and interest at six per cent., and rendered a decree of foreclosure and sale for the satisfaction of that sum and costs of suit. The plaintiff brings the case to this court by appeal.

The rule is well established that the defense of usury is personal and can not be made by one not a party to the contract, but in our opinion the transaction in suit is something more than a merely usurious loan of money. The defendant was engaged in the carrying on of an unlawful and prohibited business out of which the obligation in question arose. The note or "bond," the payment of which the mortgage was executed to secure, contracts for the payment of \$2.50 per month as interest upon the loan, being a sum a little less than six per cent. annual interest, but it also stipulates for the monthly payment of \$2.50 as premiums. It is this last item which taints the transaction with usury, but in addition thereto it is without lawful consideration and is void, and being separable and separated from the otherwise lawful agreement to pay interest, it may be successfully defended against by anyone against whom it is sought to be enforced. But there is another and analogous reason why the plaintiff ought to prevail. In any view of the case the mortgage was operative at most, only for the repayment of the valid part of the debt which did not exceed, if it equaled, the principal sum loaned with lawful interest thereon, and the payment of this sum by whomsoever made discharged the lien. There is authority for holding that the repayment of the principal alone would have had this effect, because the agreement to pay interest, being usurious, was wholly void.

Inasmuch as it appears to us from the whole record that no defense to the petition has been or can be made out, it is recommended that the judgment of the district court be reversed, and the cause remanded with instructions to enter a decree for the plaintiff as prayed.

DUFFIE and ALBERT, CC., concur.

The judgment of the district court is reversed, and the cause remanded with instructions to enter a decree for the plaintiff as prayed.

REVERSED WITH DIRECTIONS.

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ELIZABETH DUFRENE, EXECUTRIX OF THE ESTATE OF  
ALFRED R. DUFRENE, DECEASED, V. LEVERETT M. AN-  
DERSON ET AL.

FILED APRIL 17, 1902. No. 11,588.

Commissioner's opinion. Department No. 3.

1. **Appeal and Error: CONFLICTING EVIDENCE.** Findings of fact by a trial court from conflicting evidence will not be disturbed upon error or appeal, unless clearly wrong.
2. **Pleading: AMENDING TO CONFORM TO PROOF.** It is not error by a district court to deny an application for leave to amend a petition to conform to the facts proved in a case in which he finds, from sufficient evidence, that the facts sought to be pleaded have not been proved.


ERROR from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

*B. N. Robertson*, for plaintiff in error.

*W. A. Saunders*, contra.

AMES, C.

This is an action in the nature of a creditors' bill seeking to set aside a conveyance of real estate as having been made in fraud of creditors. In 1892, the defendants in error, L. M. Anderson and his wife, Ella S. Anderson, became indebted to the testator of the plaintiff, Alfred R. Dufrené, upon a note and a mortgage upon certain lands in Douglas county. The petition alleges that in November, 1896, the mortgaged property was sold under a decree of foreclosure, and a personal judgment, for a deficiency of the proceeds to pay the amount of the decree, rendered



against the mortgagors. Dufrene died testate in December, 1898, and in May, 1899, the judgment was revived in the name of the plaintiff in error as the executrix of his will. On the day following the revivor an execution was issued and returned reciting that no goods or chattels or lands or tenements could be found in the county in the possession of, or the title to which was in, the defendant in the writ, but showing a levy upon the lots in controversy, the possession and title of record of which were in the defendant in error, Arthur L. Anderson, and immediately thereafter this suit was begun. With respect to this property it was alleged that it was conveyed by Leverett M. Anderson and his wife to their son, the defendant, Arthur L. Anderson, by a deed bearing date October 10, 1894, and made of record January 14, 1896, and it was averred that the deed was without consideration and was executed for the purpose of hindering, delaying and defrauding the creditors of the grantor and particularly the plaintiff and her testator, but it was not alleged that the grantee had knowledge of that purpose or that the grantor was insolvent at that time, but he was alleged so to be at the date of the beginning of this action, but it was not shown when knowledge of a fraudulent intent, if any, on the part of the defendants, or either of them, came to the knowledge of the plaintiff or her testator, nor was any fact pleaded indicating in what such an intent consisted or how it was evidenced. The mere charge that the conveyance was fraudulent, without any allegation of insolvency at the time it was made, or of any other circumstance showing how it could at that time have been supposed to have that character, is no more than the assertion of a conclusion of law. The deed was made and possession taken under it more than two years before rendition of the testator's judgment, and more than four years prior to the beginning of this action. It does not appear that at the time of the conveyance the grantor had any other unsecured creditor than the plaintiff's testator, or that it was then known or suspected that the mortgaged property was or would be

of insufficient value to discharge the debt which it was pledged to secure. Separate answers were filed, denying any fraudulent intent and averring a consideration for the conveyance of \$500, and the assumption of apparent tax liens to the amount of \$1,600. Both these items are uncontradicted by the evidence, though it is shown that, as the result of litigation, a part of the taxes were defeated. The testimony of witnesses as to the value of the property varies from \$2,500 to \$6,000. Replies were filed to each of the answers, amounting, in substance, to general denials, and the cause proceeded to trial. The evidence with respect to all the matters of fact in issue except as above mentioned was conflicting, and at the conclusion of the trial the court found generally in favor of the defendants and rendered a judgment dismissing the action and for costs. After the trial had ended, but before the judgment was rendered, the plaintiff asked leave to amend his petition by inserting an allegation to the effect that after the conveyance in question had been made, the grantor did not have enough property left to pay his debts, and that the grantee had notice of the fraudulent intent charged. This application was made for the purpose, as averred in the motion, of conforming the pleading to the facts proved, but was denied by the court. The motion for a new trial and petition in error assign this ruling for error, and also that the findings and judgment are not sustained by sufficient evidence and are contrary to law.

Practically there is but a single assignment of error, for if the judgment is sustained by sufficient evidence then the proposed amendment, if permitted, would not have conformed the petition to the facts proved, but would have brought it into express conflict therewith. The case is, therefore, to be disposed of in accordance with the familiar rule that findings of fact by a trial court from conflicting evidence will not be disturbed upon error or appeal. From a review of the whole record we are not able to say that the findings and judgment are not sustained by sufficient

evidence. The witnesses were before the district judge, who had peculiar opportunities for judging of their character and truthfulness and of ascertaining the real nature of the transaction being investigated, and the situation of the parties thereto. After a long and thorough trial involving the hearing of more than four hundred pages of testimony, his conclusions may fairly be presumed to be correct. It is recommended that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

NOTE.—A rehearing was granted in the above case and a final opinion filed January 8, 1903, reversing the above decision and reversing the judgment of the court below. The final opinion by ALBERT C., may be found in 66 Neb., —, 93 N. W. Rep., 139.—REPORTER.

ADA E. HUBBARD, EXECUTRIX OF THE LAST WILL OF GEORGE F. HUBBARD, DECEASED, APPELLEE, v. CATHARINE HENNESSEY, APPELLANT.

FILED APRIL 17, 1902. No. 11,595.

Commissioner's opinion. Department No. 1.

1. **Mortgage Foreclosure: TIME OF FILING COPY OF APPRAISAL: SHERIFF'S RETURN.** The fact that the copy of the appraisal was not filed until the fourth day following the one on which it was made, does not of itself show that the sheriff's return that he filed it "forthwith" is incorrect.
2. **Mortgage Foreclosure: FILING COPY OF APPRAISAL "FORTHWITH": STATUTES.** "Forthwith," as used in section 491d of the Code of Civil Procedure, means as soon as with reasonable dispatch in the ordinary course of business it can be done.
3. **Mortgage Foreclosure: APPRAISAL TOO LOW: FRAUD.** An appraisal duly made of real estate for the purposes of a judicial sale can not be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisalment it must be challenged for fraud. *Brown v. Fitzpatrick*, 56 Neb., 61.

APPEAL from the district court for Douglas county.  
Tried below before DICKINSON, J. *Affirmed.*

*Hiram A. Sturges*, for appellant.

*V. O. Strickler*, *contra.*

DAY, C.

This is an appeal from an order confirming a judicial sale of real estate made in pursuance of a decree of mortgage foreclosure. A number of the objections to the confirmation relate to alleged irregularities in the certificates of liens as furnished by the county and city treasurers upon the request of the sheriff. It will not be necessary to consider any of these objections, because the record shows that at the sale the premises brought an amount equal to the gross value of the real estate as fixed by the appraisers. Granting, for the sake of argument, that the taxes were wrongfully deducted, still it is apparent that appellant suffered no injury by the reduction.

Another objection urged is that a copy of the appraisal was not filed with the clerk "forthwith." The return of the sheriff shows that the copy was "forthwith" deposited with the clerk of the court. This return is not impeached by the fact that it was deposited with the clerk on January 16, while the appraisement was made January 12. "Forthwith," as used in section 491*d* of the Code of Civil Procedure, means as soon as with reasonable dispatch in the ordinary course of business it can be done. There is nothing in the record to show that such dispatch was not used in this case. *Northwestern College v. Shreck*, *ante*, page 484, 89 N. W. Rep., 289. A copy of the appraisement was filed before the first publication of the notice of sale.

An objection is also urged that the appraisement was too low. The appellant's affidavit, the only one filed, fixed the value of the premises at \$2,500; while the value as fixed by the appraisers was \$1,600. No claim of fraud is made. The rule is now well settled that where an appraisement

Van Doren v. Empkie-Shugart Co.

of real estate has been duly made for the purpose of judicial sale, it can not be successfully attacked solely on the ground that the property has been appraised too low. To use the low valuation as a successful basis for attacking the appraisement, it must be alleged and proved that it was fraudulent. *Brown v. Fitzpatrick*, 56 Neb., 61; *Mills v. Hamer*, 55 Neb., 445; *Nelson v. Alling*, 58 Neb., 606; *Ecklund v. Willis*, 44 Neb., 129; *Kearney Land & Investment Co. v. Aspinwall*, 45 Neb., 601; *Ballou v. Sherwood*, 58 Neb., 20, 78 N. W. Rep., 383; *Lockwood v. Cook*, 58 Neb., 302, 78 N. W. Rep., 624; *Michigan Mutual Life Insurance Co. v. Richter*, 58 Neb., 463, 78 N. W. Rep., 932.

We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

AFFIRMED.

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A. L. VAN DOREN ET AL., APPELLANTS, v. EMPKIE-SHUGART COMPANY, APPELLEE.

FILED APRIL 17, 1902. No. 11,606.

Commissioner's opinion. Department No. 2.

**Appeal and Error:** REVIEW OF LAW ACTION ON APPEAL. The proceedings of a district court in an action at law can not be reviewed in this court on appeal.

APPEAL from the district court for Lancaster county. Tried below before HOLMES, J. *Appeal dismissed.*

*John S. Bishop*, for appellants.

*T. J. Doyle*, contra.

OLDHAM, C.

This cause of action was instituted by the appellee against the appellants on three promissory notes in the county court of Lancaster county, Nebraska. Appellee had judgment in the county court; appellants instituted



error proceedings to reverse this judgment in the district court. Their petition in error was dismissed by the district court and they now seek to review that action here on appeal. This they can not do, as this was an action at law and can only be reviewed in this court on proceedings in error. It is therefore recommended that the appeal be dismissed.

BARNES and POUND, CC.; concur.

APPEAL DISMISSED.

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PETER GOW, APPELLEE, v. MATT GAHLON ET AL., APPELLANTS, IMPLAINED WITH THE NEBRASKA SAVINGS & EXCHANGE BANK ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,621.

Commissioner's opinion. Department No. 3.

Mortgage Foreclosure: APPEAL FROM CONFIRMATION.

APPEAL from the district court for Douglas county  
Tried below before DICKINSON, J. *Affirmed.*

*Holmes & Morgan*, for appellants.

*Hamilton & Maxwell*, contra.

AMES, C.

This is an appeal from an order of confirmation of the sale of real estate under a decree of mortgage foreclosure. No reason is assigned why the sale should be set aside, and it is therefore recommended that the order appealed from be affirmed.

DUFFLE and ALBERT, CC., concur.

AFFIRMED.

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**THE FIRST NATIONAL BANK OF OMAHA, APPELLEE, IM-  
PLEADED WITH MATHEWSON T. PATRICK ET AL., APPEL-  
LEES, V. EAST OMAHA BOX COMPANY ET AL., APPEL-  
LANTS.**

FILED APRIL 17, 1902. No. 11,685.

Commissioner's opinion. Department No. 2.

1. **Corporations: AUTHORITY TO INCUMBER OR TRANSFER PROPERTY BY TRUST DEED: HOW GRANTED: NOTICE.** A resolution which authorizes the officers of a corporation to convey away or incumber all of its property by a trust agreement and a deed to trustees must at least be adopted by a majority of the board of directors duly assembled at a regular or called meeting of which due notice must have first been given. A resolution of that kind adopted at a called meeting of which the proper notice had not been given, and at which only one director was actually present who voted for himself and for another absent director by proxy, is not the act of the corporation and is void.
2. **Corporations: UNLAWFUL TRANSFER OF PROPERTY: RATIFICATION: CREDITORS.** The action of the officers of a corporation based upon such void resolution is void; but it may be ratified by the directors or stockholders by proper corporate action for that purpose, and also by a continued acquiescence therein on the part of the stockholders with full knowledge of all of the facts, but such ratification can not make the transaction valid as to third persons, creditors, where the same unlawfully hinders and delays them in the collection of their just claims against the corporation.
3. **Corporations: TRUST DEED IN FRAUD OF CREDITORS: EVIDENCE.** The fact that a corporation, which is being pressed by its creditors for the payment of their claims, makes a trust agreement and deed, whereby it conveys practically all of its property to trustees to secure debts due, to the amount of about \$2,500 and additional credit up to \$10,000, that its property so conveyed is worth many times that amount, and that such conveyance did in fact hinder and delay its other creditors and prevent them from collecting their just claims against it, taken together with conflicting evidence on the question of the intention of the parties to the transaction and all the other facts and circumstances surrounding it, is sufficient to sustain the finding of the trial court that the act was fraudulent and void as to such creditors.

APPEAL from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

**Montgomery & Hall, for appellants.**

The burden of showing that Mulford did not have authority to make the contract for the East Omaha Box Company is upon the plaintiffs. *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548; *Patterson v. Robinson*, 116 N. Y., 193; *Sherman Center Town Co. v. Swigart*, 43 Kan., 292.

The East Omaha Box Company announced to the world that H. B. Mulford was the party with whom all contracts should be made and that he was vested with full power to enter into the same, and so his contracts bind the company and all interested. *Hawley v. Gray*, 106 Cal., 337; *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S., 98, 109; *Martin v. Niagara Falls Paper Co.*, 122 N. Y., 165; *Davies v. New York Concert Co.*, 13 N. Y. Supp., 739, 742; *McElroy v. Minnesota Percheron Horse Co.*, 71 N. W. Rep. [Wis.], 652; *Preston National Bank v. Smith*, 47 N. W. Rep. [Mich.], 502, 504; *Thayer v. Nehalem Mill Co.*, 51 Pac. Rep. [Ore.], 202; *Taylor v. Labeaume*, 17 Mo., 338, 344; *Hoskins v. Swain*, 61 Cal., 338; *Cary-Halidy Lumber Co. v. Cain*, 13 So. Rep. [Miss.], 239; *Olcott v. Tioga R. Co.*, 27 N. Y., 546; *Kraft v. Freeman Printing & Publishing Co.*, 87 N. Y., 628; *German Fire Insurance Co. v. Grunert*, 112 Ill., 68, 75; *Rosemond v. Northwestern Autographic Register Co.*, 64 N. W. Rep. [Minn.], 925.

Even if Mulford had no authority to make the contract, yet the company, by acquiescence in, and failure to repudiate such agreement, and accepting benefit under it, ratified and is bound by it. *German National Bank of Hastings v. First National Bank of Hastings*, 59 Neb., 7; *Merchants' Bank of Lincoln v. Rudolf*, 5 Neb., 527, 540; *Stough v. Ponca Mill Co.*, 54 Neb., 500; *Rich v. State National Bank of Lincoln*, 7 Neb., 201; *Thomas v. City National Bank of Hastings*, 40 Neb., 501, 506; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Alexander v. Culbertson Irrigation & Water-Power Co.*, 61 Neb., 333, 85 N. W. Rep., 283; *Reed Bros. Co. v. First National Bank of Weeping Water*, 46 Neb., 168; *Thompson*,

Corporations, sections 5291, 5303; 2 Cook, Corporations [4th ed.], sections 712, 716, 717; 12 American Digest [Century ed.], section 1557; *Jourdan v. Long Island R. Co.*, 115 N. Y., 380; *Beach v. Miller*, 130 Ill., 162; *Stainback v. Junk Brothers Lumber Co.*, 39 S. W. Rep. [Tenn.], 530; *Witter v. Grand Rapids Flouring Mill Co.*, 78 Wis., 543; *Baker v. Harpster*, 42 Kan., 511; *Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S., 371, 381; *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548; *Omaha Consolidated Vinegar Co. v. Burns*, 49 Neb., 229; *Commercial National Bank of Omaha v. Merchants' Exchange National Bank of New York*, 47 Neb., 217, 222; *Martin v. Webb*, 110 U. S., 7; *Fifth National Bank v. Navassa Phosphate Co.*, 23 N. E. Rep. [N. Y.], 737; *Davies v. New York Concert Co.*, 13 N. Y. Supp., 739; *West Salem Land Co. v. Montgomery Co.*, 15 S. E. Rep. [Va.], 524.

The company deliberately recognized the debt contracted by Mulford and thus ratified the contract and is bound by it. *Seal v. Puget Sound Loan & Investment Co.*, 32 Pac. Rep. [Wash.], 214. A corporation may ratify an unauthorized act including the giving of a corporate mortgage: *Purser v. Eagle Lake Land & Irrigation Co.*, 43 Pac. Rep. [Cal.], 523; *Allis v. Jones*, 45 Fed. Rep. 148; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Fed. Rep., 309.

The plaintiffs, being subsequent judgment creditors, can not avoid the trust agreement under the circumstances without showing actual fraud. *O'Connor Mining & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala., 614; *Hamilton Trust Co. v. Clemens*, 17 N. Y. App. Div., 152; *Welch v. Importers & Traders' National Bank*, 25 N. E. Rep. [N. Y.], 269; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St., 110; *Gordon v. Preston*, 1 Watts [Pa.], 385.

*Isaac E. Congdon and Thomas Creigh, contra.*

An agent, general manager, or other officer of a corporation has no authority to convey or mortgage the entire property of the corporation. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H., 205; *People v. Ballard*, 134

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N. Y., 269, 296; *Hennessey v. Muhleman*, 27 Misc. Rep. [N. Y.], 232.

Corporate action is required to ratify an invalid contract. *Sellers v. Greer*, 172 Ill., 549; *Cook, Stock and Stockholders* [3d ed.], section 709; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H., 205; *Humphreys v. McKissock*, 140 U. S., 304.

The trust deed was executed with the intent of hindering and delaying, if not defrauding, appellees. The question as to whether a conveyance is fraudulent is one of fact. *Dayton Spice Mills v. Sloan*, 49 Neb., 622; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Houck v. Heinzman*, 37 Neb., 463; *Sherwin v. Gughagen*, 39 Neb., 238.

The disproportionate value of the plant to the amount the trust agreement attempted to secure is evidence to be considered in the determination of the question of fraudulent intent, or intent to hinder or delay. *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Sherwin v. Gughagen*, 39 Neb., 238; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793; *Tackaberry v. Gilmore*, 57 Neb., 450, 78 N. W. Rep., 32; *Henney Buggy Co. v. Ashenfelter*, 60 Neb., 1, 82 N. W. Rep., 118; *Ogg v. Schultz*, 61 Neb., 221, 85 N. W. Rep., 64; *Ellis v. Musselman*, 61 Neb., 262, 85 N. W. Rep., 75.

#### BARNES, C.

On the 26th day of March, 1898, the First National Bank of Omaha, Mathewson T. Patrick, Burlington Lumber Company, Rand Lumber Company, William Walter Brady, assignee, Joseph R. Lehmer and C. J. Lesure filed their petition in the district court for Douglas county in the nature of a creditors' bill against the East Omaha Box Company, the East Omaha Land Company, Harry B. Mulford, Henry F. Cady, H. F. Cady Lumber Company, Omaha Bridge and Terminal Railway Company, Alfred

B. De Long and James S. White, trustees, and the Omaha Box Company, to set aside certain conveyances in the nature of trust deeds, contracts, mortgages and bills of sale made by the East Omaha Box Company to James S. White, trustee, for Henry F. Cady and H. F. Cady Lumber Company, and Alfred B. De Long, as trustee for the Omaha Bridge & Terminal Railway Company, and by the East Omaha Land Company to the said trustees, and to subject the property of the East Omaha Box Company to the payment of their claims. The petition was in the usual form of a creditors' bill, and alleged, in substance, after setting forth in paragraph one the corporate organization of certain of the plaintiffs, that each of the several plaintiffs had obtained judgments in several different amounts, which were set forth therein, against the East Omaha Box Company; that execution on each of the said several judgments had been issued and returned by the proper officer unsatisfied for want of goods and chattels; that on the 11th day of August, 1890, the East Omaha Land Company, then the owner in fee of lots 13, 14, 15 and 16 in block 4, in the subdivision of lot 15, in East Omaha, Douglas county, state of Nebraska, being desirous of establishing manufacturing plants on said lots and near its lands in said East Omaha adjacent thereto, and thereby to enhance the value of its other lands, entered into a written contract with Harry B. Mulford, which in substance provided that said Mulford should enter upon said lots and should, on or by the first of December, 1890, erect thereon a brick building 100 x 115 feet, two stories high, together with an engine and boiler house, towards the cost of which building the said East Omaha Land Company should contribute the sum of \$4,000; and that said Mulford should, upon the completion of said buildings, commence on and in said premises, consisting of lots and buildings, the manufacture of wooden boxes, and continue in said manufacture for the period of five years, from the first day of August, 1890, with an average number of not less than fifty employees. At the expiration

of said five years said East Omaha Land Company should execute and deliver to Mulford, or his assigns, a good and sufficient warranty deed, conveying the fee-simple title of and to said lots to Mulford, or his assigns, provided Mulford kept the agreements in the contract; that upon the execution of the contract Mulford entered into the possession of the lots and commenced the erection of the buildings; that the East Omaha Land Company contributed the sum of \$4,000 towards their cost, and that Mulford expended on said buildings and in placing the machinery therein more than the sum of \$40,000; that the East Omaha Box Company, of which Mulford was the secretary, treasurer and general manager, continuously operated the plant and conducted the business of manufacturing wooden boxes on the property for more than five years from the date of the contract, and in all things fully complied with the terms of it. That Mulford and his assignee, the East Omaha Box Company, are entitled to have and receive a conveyance in fee simple of the said lots free and clear of all claims whatsoever of the East Omaha Land Company; that on or about the 15th day of June, 1893, Mulford caused to be organized a corporation under the name of the East Omaha Box Company, with the purposes and intent that the property should be transferred to it; and after the organization of the said East Omaha Box Company Mulford sold, transferred and assigned all his right, title and interest in and to the property and in and to the said contract with the East Omaha Land Company to the said East Omaha Box Company; that thereafter Mulford continued in charge of the property as chief manager thereof; that the stock of said company was chiefly owned and controlled by said Mulford, and other members of his family; that the East Omaha Box Company, as such corporation, continued to be the equitable owner of the real estate and the lawful owners of the personal property connected with the said manufacturing plant; that said plant was, and continued to be, of great value, and that during the

course of the business carried on under the name of the East Omaha Box Company there was contracted the liabilities and obligations which became the consideration for the various judgments pleaded in the petition. That afterwards, on or about the 8th day of January, 1895, the East Omaha Box Company and the East Omaha Land Company, both being desirous of extending the credit of the East Omaha Box Company, entered into a contract in writing with Henry F. Cady, then doing business as H. F. Cady Lumber Company, and the Omaha Bridge and Terminal Railway Company, which written contract provided in substance as follows: That said Cady should furnish lumber to said East Omaha Box Company at the market price, and extend credit therefor up to the sum of \$7,500; said Omaha Bridge and Terminal Railway Company should transfer freight for said East Omaha Box Company and extend a credit therefor up to the sum of \$2,000; that said East Omaha Box Company should purchase all lumber from said Cady required in its business, and ship all its freight over the road of the said Omaha Bridge & Terminal Railway Company, and as each bill of lumber was received, or shipment made, said East Omaha Box Company should issue its acceptance therefor at sixty days to said Cady, and the said Omaha Bridge & Terminal Railway Company, bearing interest at the rate of eight per cent. per annum; that to secure the payment of the amounts to become due to said Cady and the said Omaha Bridge & Terminal Railway Company said East Omaha Land Company should convey the legal title, and the said East Omaha Box Company should convey the equitable title to the premises, to-wit, the manufacturing plant and the lots on which it was situated, to Alfred B. De Long and James S. White, trustees; that said De Long and the said White should lease said premises to the said East Omaha Box Company, which should retain the possession thereof and conduct the business; that the contract should continue in force until the first day of January, 1896; that if the said East



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Omaha Box Company should fail to pay said acceptances when due, said De Long and said White, as trustees, should be authorized to declare the contract ended, the debts from the said East Omaha Box Company to Cady and the Omaha Bridge & Terminal Railway Company due, to declare forfeited all rights of the East Omaha Box Company in and to the premises, and to take possession thereof, to institute proceedings in foreclosure and from the proceedings in the foreclosure sale to pay the amounts found by them due to said Cady and said Omaha Bridge & Terminal Railway Company, and the balance to the East Omaha Land Company; or if said East Omaha Land Company should see fit to pay to Cady and the Omaha Bridge & Terminal Railway Company the amounts declared due to them, to convey said premises to the said East Omaha Land Company; and that should the East Omaha Box Company perform the contract then to convey the premises to the East Omaha Box Company; that when said contract was entered into said East Omaha Box Company was indebted to Cady, the Omaha Bridge & Terminal Railway Company in large sums, and was also indebted to plaintiffs and other parties, and was insolvent; and the fact that the East Omaha Box Company was indebted and insolvent was well known to all of the parties to said contract, and to said De Long and to the said White; that at that time the lots and buildings thereon, the engine, appliances and personal property were of great value, about the sum of \$60,000; and that the amount of indebtedness to be secured to the said Cady, the Omaha Bridge & Terminal Railway Company was of comparatively small amounts as appear from said contract; that the purpose and intent of said contract was to give Cady and the Omaha Bridge & Terminal Railway Company an unlawful preference over the other creditors of the East Omaha Box Company, including the plaintiffs, and to further so place and manipulate the property as to prevent the plaintiffs from the collection of their claims; that the East Omaha Box Company, the said

Cady and the said East Omaha Land Company have ever since continued to so manipulate the property as to hinder and delay these plaintiffs in the collection of their claims.

It is further alleged in the petition that in pursuance to the terms of the contract of January 8, 1895, the East Omaha Land Company conveyed the legal title to said premises, and the East Omaha Box Company conveyed the equitable title thereto to De Long and White; and De Long and White executed a lease for said premises to the East Omaha Box Company, which was to terminate on the first of January, 1896; that the East Omaha Box Company continued in possession of the premises and continued to conduct the business until sometime in the month of December, 1895; that at the time of making the contract De Long was an employee and representative of the East Omaha Land Company, and of the Omaha Bridge & Terminal Company, and White was a joint owner with and an employee or representative of said Cady; that during the month of December, 1895, the said parties further conspiring together to hinder and delay the plaintiffs in the collection of their claims, and further manipulating the property in the interest of Cady and said Omaha Bridge & Terminal Railway Company, the trustee, White, entered into the possession of the manufacturing plant and ousted the East Omaha Box company from the possession thereof under the pretended authority of the East Omaha Box Company, and converted to his own use and the use of Cady and the Omaha Bridge & Terminal Railway Company the stock of materials, bills receivable, all accounts and other personal property belonging to the East Omaha Box Company, claiming a right to do so by virtue of a bill of sale from the East Omaha Box Company, and thereupon undertook the conduct of said box manufacturing business; that said pretended authority was given and said bill of sale executed and delivered to White by Mulford as secretary of the East Omaha Box Company, but

Mulford as such secretary was without right and power to act in the premises. That to further carry out said conspiracy and scheme, to hinder and delay the plaintiffs in the collection of their claims to further place the property of the East Omaha Box Company beyond the reach of its creditors, that Cady and White organized another corporation under the name of H. F. Cady Lumber Company, with the purpose and intent of making a further transfer of the property to the last named corporation and without any consideration therefor, and to put the said Cady in apparent ownership and control of the East Omaha Box Company; that thereupon, White, without authority of law and without the consent of the East Omaha Box Company, turned over the possession of the said manufacturing plant to Henry F. Cady, and by a bill of sale transferred all of the personal property thereof to the H. F. Cady Lumber Company, all with the pretended assent of the East Omaha Box Company, but in fact the East Omaha Box Company never in anywise acted in the premises or gave its assent thereto. That to further carry out said scheme the said James S. White and the said H. F. Cady Lumber Company continued in the possession of said manufacturing plant and in the conduct of its business until in the month of April, 1897; that they converted to their own use all of the revenues and profits of the said manufacturing plant; that on or about the month of April, 1897, White and the said H. F. Cady Lumber Company organized another corporation under the name of the Omaha Box Company, and, without any consideration whatever, the said White and the H. F. Cady Lumber Company transferred the possession of the said manufacturing plant to the Omaha Box Company; that since said time White and Cady have continued in the control and management of the said manufacturing plant establishing claim and title thereto under the said Omaha Box Company, and have continuously operated the same and conducted the business of manufacturing wooden boxes and received and converted to their own

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use all of the profits arising from said manufacture, and have in no manner accounted to the East Omaha Box Company therefor.

The petition concludes with the usual averments of fraud and conspiracy, and further charges that all of the matters and things set forth in the petition and the proceedings had in and by virtue of the pretended conveyances have been had and taken with intention to hinder and delay the plaintiffs and other creditors of the East Omaha Box Company in the collection of their several judgments; the petition concludes with a prayer for an accounting; that the several conveyances and contracts mentioned therein be declared null and void, and held to be and to have been made, executed and performed in fraud of the rights of creditors of the East Omaha Box Company; that the amount due upon the several judgments be ascertained and the priority of their several claims be established; that the property be ordered sold to satisfy such claims in the order of their priority.

To this petition the defendants, Henry F. Cady, the H. F. Cady Lumber Company and the Omaha Box Company, filed separate answers, denying the matters of conspiracy and fraud charged in the petition, and setting up practically the same contracts, conveyances and transactions mentioned therein, and alleging that the same were made and executed in good faith for the purpose of assisting the East Omaha Box Company in carrying on its business, and to secure the amounts due from it to the Omaha Bridge & Terminal Railway Company, and to Henry F. Cady and the H. F. Cady Lumber Company. In addition thereto James S. White, and Alfred B. De Long, as trustees, filed an answer in the nature of a cross-petition, setting up the several contracts and conveyances, together with the claims of the said Henry F. Cady and H. F. Cady Lumber Company, and the Omaha Box Company, and concluding with a prayer for an accounting to ascertain the amount due the said Henry F. Cady and the H. F. Cady Lumber Company; and that the same

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be decreed a first lien upon the property of the East Omaha Box Company; that the contracts and trust deed be foreclosed, and that out of the proceeds the said claim of the said defendant, Henry F. Cady, be ordered to be first paid.

To these answers the plaintiffs replied, denying the matters therein contained, and setting forth actual and active fraud in the execution of the deeds, contracts and agreements, and the matters and things done and performed by the defendants thereunder.

We have thus set forth, *in extenso*, the questions raised by the pleadings so that our determination of the matters herein may be thoroughly understood.

Upon these issues a trial was had, and the court found for the plaintiffs. The particular findings which concern us in this investigation are as follows: "The court finds that the so-called trust agreement dated January 8, 1895, and referred to in the petition and cross-petition and purporting to be executed by the East Omaha Box Company, a corporation, was not so executed by such corporation and was and is not valid as against the plaintiffs, except the plaintiff, Mathewson T. Patrick." Upon these findings, together with others, the court made the following decree: "It is therefore considered and adjudged that the interest of the East Omaha Land Company, the East Omaha Box Company, Omaha Box Company, Omaha Bridge & Terminal Railway Company, Alfred B. De Long, James S. White, trustees, and Harry B. Mulford, in the property hereinbefore described, and of all those claiming by, through or under them, be forever barred and foreclosed; and that said property be sold as upon execution according to law, and that out of the proceeds thereof there be paid, first the costs of this action; second, the amounts with interest hereinbefore found to be due the first National Bank of Omaha, Burlington Lumber Company, Rand Lumber Company, William Walter Brady, assignee, Joseph R. Lehmer, C. J. Lesure and Henry F. Cady, and if there be not enough realized from the sale

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of said premises to pay such amounts in full, then the proceeds derived from the sale of the property, after paying the costs, shall be ratably distributed among such parties; that after the payment of the foregoing amounts, if anything remains from the proceeds of such sale it shall be paid to the plaintiff, Algernon S. Patrick, executor of the will of Mathewson T. Patrick, deceased, or so much thereof as shall be sufficient to pay the amount found herein to be due him, with interest; the balance, if any remain, to be brought into court to await further orders in the premises."

It will thus be seen that all of the plaintiffs, except Patrick, and the defendant, Henry F. Cady, were placed upon the same footing, and were entitled to share ratably in the proceeds of the sale of the premises and property in question. From this decree Henry F. Cady appeals to this court, and contends that the finding is not sustained by the evidence and is contrary to law. The undisputed facts established upon the trial are: That in the year 1890 the East Omaha Land Company entered into the contract with Harry B. Mulford to donate to him the lots, and \$4,000 in money as a bonus and for which he was to build and maintain a box factory on these lots, employing fifty people, and to keep it a going concern for five years, as set forth in the petition herein; that thereupon Mulford entered into the possession of the premises and erected and equipped the box factory, costing about \$48,000; that at that time the real estate was worth about \$6,000, making the total valuation of the completed plant about \$54,000; that for a time Mulford operated the plant in his own name, but later on organized a corporation, called the East Omaha Box Company, the individual corporators being Harry B. Mulford, John C. Mulford and Daniel Farrell, Jr.; that Harry B. Mulford at once transferred the plant, and the contract with the East Omaha Land Company, together with all of the property belonging to the plant and used in the business, to the said corporation; that stock to the amount of \$60,000 was issued, of which

Harry B. Mulford, his father, John C. Mulford, and his mother, Georgiana Mulford, took \$55,000, and the balance of \$5,000 was distributed among his friends and relations. It is not shown that any of the stockholders ever paid a single dollar for their stock. By this organization he was made secretary and treasurer of the corporation, and given the full management and control of its business. Thereafter the concern was run under the name of the East Omaha Box Company, which assumed the debts of the former concern, and went so far as to give its note for \$13,000, or about that sum, to the First National Bank of Omaha, one of the plaintiffs herein. About the first of January, 1895, it became necessary for the East Omaha Box Company to have more money to operate with, or in some way to secure a more extended credit. Mulford thereupon applied to the First National Bank of Omaha for a further loan, and the bank declined to further assist the concern. He thereupon applied to the East Omaha Land Company, the Omaha Bridge & Terminal Company and Henry F. Cady, and it was agreed by them that if the East Omaha Box Company and the East Omaha Land Company would transfer the equitable and legal title to the plant and the real estate to James S. White, trustee, for Henry F. Cady, and Alfred B. De Long, trustee for the Omaha Bridge & Terminal Railway Company, to secure the payment of the sum of about \$1,100 then due from the box company to Cady, and a small amount due from the box company to the said Terminal Railway Company for freights, the said Cady would extend credit to the box company, including the debt then due him, to the amount of \$7,500, and that the Terminal Railway Company would extend credit to the box company, including the sum due to it, to the amount of \$2,500; that thereupon Harry B. Mulford called a directors' meeting of the East Omaha Box Company, and at that meeting there was present Harry B. Mulford in person, and Harry B. Mulford as proxy for his father, John C. Mulford, the other director being neither present in person nor by proxy, and it was

resolved that the corporation should enter into the proposed agreement and should convey its plant and equitable interest in the real estate to the said trustee; that on the 8th day of January, 1895, the contract and agreement were signed, and the corporation made a quitclaim deed of its equitable interest in and to the premises to the trustees; and the East Omaha Land Company conveyed to them the lots upon which the plant was situated, by warranty deed; that at and before that time some of the plaintiffs herein, creditors of the East Omaha Box Company, were pressing that concern hard for the payment of their claims; that the trustees thereupon leased the plant back to the corporation for the term of one year. That thereafter Harry B. Mulford continued to run the plant in the name of the East Omaha Box Company until December 2, 1895, at which time Cady's claim against the corporation had reached the sum of \$9,393.20, and the account of the railway company had been reduced to \$100; that on the said second day of December, 1895, Henry F. Cady for the alleged purpose of securing his claim induced the East Omaha Box Company to make a bill of sale to the trustee, James S. White, who was, and at all times had been, one of his employees, conveying to the said trustee "All of the stock on hand of the box company, all bills and accounts receivable on the books of said company, the books containing said accounts; also the horses, wagons and other personal property used in connection with the business of the said company"; and also procured a lease of the plant from the said box company for the alleged consideration of \$1 to the said trustee; that Cady paid the Terminal Railway Company the \$100 still due it, and thereupon trustee De Long appeared no further in any of the papers or transactions. From that time until April 3, 1897, the business was carried on in the name of James S. White, trustee, who was in absolute control and possession of the plant, and of the personal property belonging to it and used in its business, and Mulford was his manager on a salary of \$100 per month; that on the 3d day of



April, 1897, the claims of Henry F. Cady and the H. F. Cady Lumber Company against the East Omaha Box Company had reached the sum of more than \$12,000; that at that time the box company transferred all its remaining property of every kind to the H. F. Cady Lumber Company, a corporation which had been organized by Henry F. Cady, James S. White and other employees of the said Cady; that the said Omaha Box Company, with Henry F. Cady as principal stockholder, president and manager, took possession of the entire property and plant of the East Omaha Box Company, discharged Harry B. Mulford, and from that time to the commencement of this suit has been running the same as its own. No actual notice of these transactions was given by any of the parties thereto to the creditors of the East Omaha Box Company, but all of the paper transactions were recorded and plaintiffs had such notice as the records would give them of what was being done. That all of the creditors proceeded with due diligence to reduce their claims to judgments, have had executions issued thereon, and that the same were all returned by the officer unsatisfied for want of property of the East Omaha Box Company whereon to levy. That this action was thereupon seasonably commenced; that Mathewson T. Patrick paid the bank about \$6,000 of the debt due it from the East Omaha Box Company as indorser of its paper, and that he was a small stockholder in the concern.

The disputed question of fact is whether or not these things were done for the express purpose of defrauding the creditors of the East Omaha Box Company, or with the intention of hindering and delaying them in the collection of their just claims against the corporation. On this question the evidence was conflicting. Harry B. Mulford testified that the matter was talked over between himself and trustee White, frequently; that White said they could beat out all the other creditors; that such was not his own intention, but he did intend to fix matters so that the creditors could not "jump the plant," as he expressed

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it, and that Cady insisted on having matters so arranged that the other creditors could not make them any trouble. White and Cady both denied these statements.

1. The first question for us to consider is, do the facts, which are established beyond dispute, sustain the finding of the court that the trust agreement and deed of January 8, 1895, by which it was attempted to convey the property of the East Omaha Box Company to the trustees, White and De Long, were not the act of the corporation? It must be remembered that by this trust agreement and quitclaim deed practically the whole property of the corporation was conveyed to the trustees, White and De Long; and full power was granted them to terminate the business of the corporation at any time there was a failure to pay a single acceptance. Not only is this true but power was given to the trustees to sell and dispose of the property and out of the proceeds to pay Henry F. Cady and the Terminal Railway Company the amounts due to them, and the balance, not to the corporation or its stockholders, but to a third party, to wit, the East Omaha Land Company. Such act ought never to be upheld except it be authorized by a vote of a majority of the stockholders of the corporation. But if it be conceded that the directors had power to authorize the making of such an agreement, in order to make it the corporate act it must have been authorized by a majority of the board of directors assembled in general or special meeting duly called for that purpose, of which the proper and suitable notice should have been given, and by a majority vote of the directors present at such meeting. Was this transaction so authorized? At the so-called meeting of the directors on the 7th day of January, 1895, there was present Harry B. Mulford in person and Harry B. Mulford as proxy for his father, John C. Mulford, David Farrell, Jr., being absent. Harry B. Mulford testifies that the written notice of the meeting had not been mailed to his father and Farrell in time to reach them before the meeting. At this meeting Harry B. Mulford being the only person present in person; proposed the

resolution authorizing the officers of the corporation to execute the trust agreement and the deed by which the property was conveyed to the trustees; secondly, at the meeting, put the question, voted aye for himself, and his father, by proxy, declared the resolution valid, and thereupon made the proper record thereof. It is contended that a corporation can not delegate his power to the board of directors by giving his proxy to another person. He must be present in person for the purpose of voting. Directors are elected to meet and conduct business. To change ideas, they can not vote or act in any other manner. A director of course can not act or vote by proxy. See *Corporations* [4th ed.], section 713a; 3 *Thornton on Corporations*, section 3909; *Perry v. Tuscaloosa Co.*, 9 So. Rep. [Ala.], 217; *Craig Medicine Chants' Bank*, 59 Hun [N. Y.], 561.

It is contended that the by-laws of this corporation have abrogated this well established rule. The adoption of these by-laws and the manner in which they were adopted shows that they were never adopted by the stockholders or by the original incorporators, but were adopted by a board stated to be the first board of directors provided for in the articles of incorporation at a so-called meeting at which was present Harry B. Mulford in person, Harry B. Mulford proxy for his father, John C. Mulford, and no one else. Therefore, such by-laws were never legally adopted. It follows that the action of Harry B. Mulford on January 8, 1895, authorizing the making of the trust agreement and the deed of January 8, 1895, is valid. That the deed and agreement were not the work of the corporation, the East Omaha Box Company; that the finding of the trial court on this point is right and must be sustained.

2. It is contended that even if the acts above mentioned were void they have since been ratified by the corporation or by its stockholders. It is not shown that there was any action by any direct proceedings for that purpose to ratify these acts. And if it be contended that the stockholders have done so, it must be answered that

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means certain that they were ever fully informed as to what had been done. The learned trial court, in view of the situation, held that the stockholder and one time director, Mathewson T. Patrick, was in such a position that he was bound by these acts. But it can not be contended that the plaintiffs, creditors of the corporation, ever ratified this transaction; and whatever the East Omaha Box Company may have done could in no manner ratify or make binding these void acts as to them.

3. The next question to consider is the effect of these transactions upon the rights of the creditors. It must be conceded that after January 8, 1895, it was impossible for the plaintiffs to collect anything on any of their claims against the corporation. There was never a time after that date that an execution or an attachment could have been successfully levied on any of the property belonging to the East Omaha Box Company. Therefore, the trust agreement, deed and bills of sale most effectually hindered and delayed the creditors in the collection of their just claims against Mulford and the corporation. It will be observed that the property never actually changed hands. The East Omaha Box Company continued in the possession of it under lease, it is true, but there had been no visible or actual change of possession, and for a time the business was conducted for the corporation by Harry B. Mulford the same as before. It must also be remembered that the corporation conveyed all of its property and assets to the trustees to secure the payment of an indebtedness amounting to about \$1,600, due at that time, and which in no event was to exceed the sum of \$10,000. That the lowest estimate placed upon the value of the property conveyed was \$34,000, and the highest estimate of its value was \$54,000; this was a sum so largely in excess of the debt as of itself to raise a presumption of fraud. We must further consider the question of the actual intention of the parties at the time the transactions were made. Upon this question there was, as we have before observed, a conflict of evidence. Taking all these matters into con-

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sideration, we hold that there was sufficient evidence to sustain the finding of the lower court; that the transaction was fraudulent and void as to the creditors, the plaintiffs herein. *Houck v. Heinzman*, 37 Neb., 463; *Sherwin v. Gagghagen*, 39 Neb., 238; *Brown v. Work*, 30 Neb., 800; *Thompson v. Richardson Drug Co.*, 33 Neb., 714. The mere fact that one of the considerations on the part of Mulford was a desire to keep the corporation apparently a going concern is not sufficient to remove from the transactions the taint of fraud.

The findings of the trial court are amply sufficient to sustain the decree based thereon, and this decree, as it appears in the record, seems in all things to be right. We therefore recommend that it be affirmed.

OLDHAM and POUND, CC., concur.

AFFIRMED.

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UNION STOCK YARDS NATIONAL BANK, APPELLANT, v. RILEY  
E. HASKELL ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,649.

Commissioner's opinion. Department No. 2.

1. **Appeal and Error: FINDINGS APPROVED.** Findings of fact of the trial court examined and approved.
2. **Mortgage Foreclosure: DEBTOR AND CREDITOR: OVERDILIGENCE OF DEBTOR.** A debtor should not ordinarily be punished for overdiligence in meeting his honest obligations.
3. **Pleading: DRAWING DEPOSITS OF TRUSTEE TO HIS OWN ACCOUNT: GOOD FAITH OF BANK: GENERAL DENIAL NOT SUFFICIENT.** In an action against a bank for money deposited by a trustee to his own account, evidence of payment by the bank on checks subsequently drawn by such trustee in good faith relying on his apparent title to said fund is inadmissible under general denial. Such fact, to be available as a defense, must be specially pleaded. *Cady v. South Omaha National Bank*, 46 Neb., 756, 65 N. W. Rep., 906, followed.
4. **Principal and Agent: PAYMENT OF NOTE TO AGENT: HOLDER OF NOTE BOUND.** When payment is made to the agent of the holder of a negotiable promissory note and the authority of such agent to

receive such payment is fully established by competent evidence, such payment is binding on the holder of the note, although the agent did not have the note in his possession at the time of such payment.

5. **Trusts: DEPOSIT TO PRIVATE ACCOUNT: RETAIN THEIR CHARACTER.** Trust funds do not lose their character as such by being deposited in a bank by the trustee to his own account. *Ogdy v. South Omaha National Bank*, *supra*, followed.

**APPEAL** from the district court for McPherson county. Tried below before SULLIVAN, J. *Affirmed.*

*Kennedy & Learned* and *Wilcox & Halligan*, for appellant.

*Hoagland & Hoagland*, contra.

OLDHAM, C.

This was an action to foreclose a real estate mortgage on lands situated in McPherson county, Nebraska. The mortgage purported to have been made to secure the payment of a note given by defendant, Riley Haskell, to the plaintiff bank for \$3,325 dated May 1, 1896, and due six months after date; but, as clearly appeared by a written contract entered into by plaintiff bank and defendant, Riley Haskell, at the time these instruments were executed, this mortgage was really given as additional security for the payment of whatever sum should be found due on a note of \$11,035 given by defendant, Haskell, to the firm of Allyn, Smith & Co. on July 31, 1894, and indorsed by said firm to the plaintiff bank.

The only question involved in this controversy with which we have to deal is the claim of defendant, Haskell, for a credit of \$1,689 on this note, this sum being the proceeds of the sale of three car-loads of his cattle made by Allyn, Smith & Co. in Chicago, the proceeds of which were placed by them to their credit in plaintiff's bank on January 30, 1895. The trial court allowed this credit to defendant, Haskell, and rendered a judgment in favor of plaintiff for the balance due on the note, and entered a

decree of foreclosure of the mortgage in conformity with such judgment, and plaintiff brings the case to this court on appeal.

The material facts connected with this controversy are that the firm of Allyn, Smith & Co. were engaged in the business of buying and selling cattle on commission; that they occupied an office in South Omaha, Nebraska, in a building next to the building in which plaintiff's bank was conducted; and that they did all their banking business with plaintiff and plaintiff was thoroughly familiar with their method of transacting business. In connection with selling cattle on commission they loaned money to cattlemen to be used in the purchase of cattle. When such loans were made the firm would draw checks on the bank for the amount of the loan and when the deal was consummated would take a note and chattel mortgage on the cattle and indorse this note to the bank and receive credit on their account for it against the checks which they had drawn on the bank.

In the summer of 1894 this firm agreed with the defendant, Riley Haskell, to loan him money for the purchase of cattle in the state of Utah. In pursuance of this agreement Haskell went to Utah and purchased a large number of cattle. When the cattle were purchased he would pay for them by drafts on Allyn, Smith & Co.; Allyn, Smith & Co. would honor these drafts by checks on the plaintiff bank, which were paid by the bank. After Haskell had purchased his cattle he shipped them to his ranch in McPherson county, Nebraska, and gave the firm of Allyn, Smith & Co. his note for \$250 for their commission on the loan and also gave to them his note for \$11,035—for the loan—and secured this note by a chattel mortgage on all the cattle which he had purchased. This chattel mortgage contained the following, among other conditions: "And in case that removal may hereafter become necessary, and be consented to in writing by the party of the second part, the costs and expenses of any such removal shall be borne and paid by the party of the first part, and when removed

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or shipped for sale, they shall be consigned to Allyn, Smith & Co., mortgagee aforesaid, at South Omaha, Nebraska, to be sold on commission." In conformity with their course of dealing Allyn, Smith & Co. indorsed this note to plaintiff bank and received credit for it on their account. Payments on this note, about which there is no dispute, were made from time to time by the application of the proceeds of the sale of cattle shipped to South Omaha by defendant, Haskell, until the amount claimed to be due on the note at the time this suit was begun was \$2,755.71. From the amount so claimed the court below deducted the disputed credit of \$1,687 and found the amount due plaintiff to be \$1,072.06.

In January, 1895, and a short time before the note became due, Allyn, Smith & Co. requested the defendant, Haskell, to make a shipment of cattle to them to be applied on his note. In conformity with this request, Haskell shipped four car-loads of cattle to Allyn, Smith & Co. at South Omaha on the 28th day of January, 1895. Three car-loads of the cattle, so shipped, were mortgaged cattle, and one car-load was mixed cattle of his own. When these cattle were received at South Omaha the car-load of Haskell's cattle was sold there by Allyn, Smith & Co. and part of the proceeds of the sale of this car-load of cattle was applied on the commission note of \$250 which Allyn, Smith & Co. held against Haskell, and the remainder of the proceeds of the sale of this car-load was properly accounted for. The other three car-loads of cattle were sold by Allyn, Smith & Co. through a commission firm in Chicago. By direction of Allyn, Smith & Co. Haskell went with the cattle to Chicago bearing a letter of instruction from the firm to the Chicago commission company. The proceeds of the sale of the cattle in Chicago were remitted by draft to Allyn, Smith & Co. and this draft they placed to their credit in the plaintiff bank on the 30th day of January, 1895, one day before Haskell's note became due. On the day that this draft was placed to the credit of Allyn, Smith & Co. at the bank their account was over-



drawn \$1,187.03 and the firm was then insolvent. The trial court found that the bank knew the condition of Allyn, Smith & Co at the time this draft was placed to their credit, and the evidence fully sustains this finding of fact. The court also found that the bank knew that the draft was for the proceeds of cattle which Allyn, Smith & Co. had sold on commission, and that by slight effort they could have ascertained from that company who the owner of the cattle was.

It is conceded by counsel for the plaintiff bank that if this shipment of cattle had been made to Allyn, Smith & Co. after the note became due and the three days of grace thereon had expired, then, under the course of dealing shown to have existed between Allyn, Smith & Co. and the bank, as well as by the conditions of the mortgage above set out, Allyn, Smith & Co. would have been authorized to receive the proceeds of the sale of the cattle in part payment of the debt in controversy, provided they had sold them on commission in South Omaha; but they contend that as the cattle were shipped three days before the note was due and were sold in Chicago and not in South Omaha, that Allyn, Smith & Co. exceeded the authority of their agency in making the collection and the bank is not bound by the payment made to them. In the court below the bank tried the case on the theory that Haskell had shipped these cattle to Chicago on his own responsibility, but the evidence at the trial clearly and unmistakably shows that Allyn, Smith & Co. and not Haskell negotiated the sale of the cattle at Chicago, and the trial court so determined in his findings of fact.

An inspection of the condition of the chattel mortgage shows that there is no provision made as to where the commission firm should sell the cattle. The only requirement being "that they should be consigned to Allyn, Smith & Co., mortgagee aforesaid, at South Omaha, Nebraska, to be sold on commission"; so that Haskell fully complied with this condition of the mortgage when he consigned the cattle to Allyn, Smith & Co. at South Omaha, and it was

not for him but for the firm to determine on what market the cattle could be sold to the best advantage. The bank knew the condition of this mortgage when they purchased the note, and, according to the testimony of its cashier, they expected Allyn, Smith & Co. to collect this note by selling cattle covered by the mortgage shipped to them by Haskell and applying the proceeds of the sales on the note. If they desired to limit the authority of Allyn, Smith & Co. to sell these mortgaged cattle at South Omaha, they should have notified Haskell of such limitation.

We do not look with much favor on the contention of plaintiff bank that Haskell should be denied this credit because the payment was made one day before the note became due and four days before grace had expired on it. We do not think a debtor should ordinarily be punished for overdiligence in meeting his obligations; and when we consider the possible and probable delays in shipping cattle a long distance to market, as was necessary in this case, and in negotiating the sale of them after they have arrived, we hesitate to say that the evidence in the record shows Haskell to have been guilty of such a degree of reprehensible overanxiety to meet an honest debt the very day it became due as would warrant us in denying him this credit for having confederated with the bank's agent in this kind of a conspiracy.

It is lastly contended by counsel for plaintiff bank that the proceeds of the draft received by Allyn, Smith & Co. for the sale of the Haskell cattle were not applied on the overdraft that firm had at the bank, but were checked out by that firm before the bank discovered the true nature of the draft. The bank does not deny that Allyn, Smith & Co. was overdrawn \$1,187 when the draft was deposited by them, but they claim that on the same day other deposits were made by this firm in addition to the draft which made their total deposit for that day \$3,053.36, and that a large number of checks drawn by Allyn, Smith & Co., aggregating \$1,985.52, were paid the same day, leaving an overdraft against their account at the close of business that

day of \$119.19. This is a theory that was not in the pleadings filed in the court below, and the rule announced by this court in the case of *Commerce Omaha National Bank*, 46 Neb., 756, 65 N. W. 2d, 100, this theory, to have been available, should have been specially pleaded.

In the court below plaintiff bank presented evidence that Allyn, Smith & Co. had settled with the bank for the proceeds of the draft in dispute and that the bank had given him its note and some securities in satisfaction of its liabilities to him on this draft. This theory was attempted to sustain by the testimony of its cashier. The evidence did show that the cashier of the bank held some securities of Allyn, Smith & Co. as collateral. Haskell and the Big Springs Land & Cattle Company had endeavored to persuade Haskell that these securities and a note of the firm, for the amount of this draft, were all he could ever get and that he had better take them. But Haskell testifies that after showing the papers to his attorney and being advised by him he refused to take them and return them to the cashier of the bank. In conflicting testimony on this question the trial court found in favor of Haskell.

It would therefore seem that the trial court was justified in holding that the firm of Allyn, Smith & Co. were the authorized agents of the plaintiff bank in collecting the amount due on this note from the proceeds of the cattle sold under the conditions of the chattel mortgage given to secure the note, and that defendant, having received a payment to an agent of plaintiff having authority to receive it in the manner in which it was made, is estopped from his credit for such payment, although the agent has the note in his possession at the time the payment was made. *Stuart v. Stonebraker*, 63 Neb., 554; *National Bank v. Johnson*, 30 Fed. Rep., 588.

We also think that the theory of the learned trial court that the draft for the proceeds of the cattle in dispute was clearly a trust fund which did not lose its character

such by being deposited in the bank to the credit of Allyn, Smith & Co., is fully justified by all the evidence connected with this transaction. In fact the testimony in this case, so far as the theory of the disputed draft being a trust fund is concerned, places it clearly within the rule announced by this court in *Cady v. South Omaha National Bank*, *supra*; also, *Cady v. South Omaha National Bank*, 49 Neb., 125, 68 N. W. Rep., 358; also by *Union Stock Yards National Bank v. Campbell*, *ante*, page 72. This doctrine is also supported by *Union Stock Yards Bank v. Gillespie*, 137 U. S., 411; *Clemmer v. Drovers' National Bank*, 41 N. E. Rep. [Ill.], 728.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

AFFIRMED.

POUND, C., concurring.

I concur. By the express terms of the mortgage, the mortgaged cattle were to be consigned to Allyn, Smith & Co. to be sold on commission. The cashier testifies that the bank expected them to collect the note by selling the cattle. It is clear that the cattle were sold under the mortgage and in the manner contemplated thereby. That this was done at a time when the mortgagor could not have been compelled to sell or to permit a sale, can not be material. No sale could have been had at the mortgagor's instance without the consent of the mortgagees. The cattle were sold as the mortgage provided, at the instance of Allyn, Smith & Co.; and in procuring and making the sale so as to have the money ready at maturity of the note, the latter only did what was expected of them. As the cattle were sold under the mortgage, the proceeds should be applied upon the mortgage debt. The sale was required to be on commission through Allyn, Smith & Co. It was for the bank to see that they accounted to it for the money which they collected and the bank intended them to collect pursuant to the provisions of the mortgage.

City of Crete v. Hendricks.

## THE CITY OF CRETE V. HENRY O. HENDRICKS.

FILED APRIL 17, 1902. No. 11,652.

Commissioner's opinion. Department No. 3.

1. **Pleading: GENERAL DENIAL IN REPLY: SUFFICIENCY.** A reply denying "each and every allegation of new matter" contained in the answer, while vulnerable to a motion for a more definite and certain denial, if not so assailed, is sufficient to put in issue the affirmative matters contained in the answer.
2. **Damages: PERSONAL INJURIES: EXHIBITING INJURED MEMBER TO JURY.** In an action for personal injuries it is not error to permit the plaintiff to exhibit the injured member to the jury after the introduction of evidence to the effect that it was permanently injured as and in the manner alleged in the petition, and that its condition at the time exhibited was wholly due to such injury.
3. **Trial: REQUEST FOR SPECIAL FINDINGS: DISCRETION OF COURT.** A request for special findings is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it appear there has been an abuse of discretion.
4. **Appeal and Error: EXAMINATION OF WITNESS: OBJECTION TO QUESTION: OFFER OF PROOF.** The ruling of the trial court sustaining an objection to a question propounded to a witness will not be reviewed in the absence of an offer showing what the party complaining of such ruling expected to prove by the witness.
5. **Damages: PERSONAL INJURIES: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* sufficient to sustain the verdict.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Affirmed.*

*G. H. Hastings*, for plaintiff in error.

*J. H. Grimm* and *A. R. Scott*, *contra.*

ALBERT, C.

This action was brought by Henry O. Hendricks against the city of Crete to recover for injuries sustained by the plaintiff by reason of defects in one of the sidewalks of the defendant. There was a verdict and judgment for the plaintiff. The defendant brings error.

Complaint is made of the ruling of the court on a mo-

tion of the defendant to require the plaintiff to separately state and number his causes of action, and on another, by the same party, to strike a certain paragraph of the petition. The record discloses that such motions were filed, but fails to show that they were ever passed on by the court. That this court can not review rulings not shown by the record is obvious.

The defendant pleaded certain affirmative matters in defense of the action. The reply of the plaintiff was as follows: "Now comes the said plaintiff, and [for] his reply to defendant's answer filed herein denies each and every allegation of new matter therein contained, and each and every allegation therein that is in conflict with and in any way contradicts the allegations in plaintiff's petition contained." The defendant insists that the foregoing reply does not constitute a denial of the affirmative matter in the answer, and, consequently, that such new matter stands admitted. The reply was vulnerable to a motion for a more definite and certain denial. It was not assailed in that way, nor in any other way, except in the motion for a new trial. Under such circumstances, it will be held to be just what it purports to be, a denial of "each and every allegation of new matter" contained in the answer.

The injury alleged to have been sustained by the plaintiff was to his foot. He was permitted over defendant's objection to exhibit the injured foot to the jury. This is assigned as error. The foot was exhibited to the jury after the introduction of evidence to the effect that it had been permanently injured as and in the manner alleged in the petition, and that its condition at that time was wholly due to such injury. There was no error in the ruling of the court on this point.

The defendant submitted a request for special findings on certain questions. The request was denied, and such denial is now assigned as error. A request for special findings is addressed to the sound discretion of the trial court, and its rulings thereon will not be disturbed, unless it appear that there has been an abuse of discretion.

*Floaten v. Ferrell*, 24 Neb., at page 353; *Mar. v. Kilpatrick*, 25 Neb., at page 119; *Nebraska Insurance Co. v. Christensen*, 29 Neb., at page 119. The questions submitted partook largely of the cross-examination, and were directed, for the evidential rather than to the ultimate facts. There was no abuse of discretion in denying

It is next urged that the court erred in its objections to certain questions, propounded to the defendant's witnesses. Such rulings were followed by the defendant showing what it expected of the witness. Such omission precludes a ruling in question.

Complaint is made of the refusal of the court of certain instructions alleged to have been tendered to the defendant. The record does not disclose that the defendant tendered any instructions. Under the heading "Refused Instructions" are several instructions which bear the indorsement "Refused, plaintiff and others." By the refusal of these instructions, the defendant's case was not prejudiced. The instructions which were tendered does not appear, except by inference, assuming that the defendant tendered the instructions. The question, it was not error to refuse them, on the ground that the question was fully covered by instructions given by the court on its own motion.

It is claimed that the damages are excessive and that the verdict is not sustained by sufficient evidence. The court have examined the evidence, and are satisfied that the damages are ample to sustain the verdict.

It is recommended that the judgment be affirmed.

AMES and DUFFIE, CC., concur.

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Connecticut Trust & Safe Deposit Co. v. Trumbo.

CONNECTICUT TRUST & SAFE DEPOSIT COMPANY, APPELLANT, V. ASA TRUMBO ET AL., APPELLEES.

FILED APRIL 17, 1902. No. 11,653.

Commissioner's opinion. Department No. 1.

1. **Bills and Notes: INDORSEMENT BEFORE DUE AS COLLATERAL: BONA FIDES.** Where a negotiable promissory note is indorsed and transferred, before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value.
2. **Principal and Agent: COLLECTION OF PRINCIPAL: EVIDENCE OF AGENCY.** Evidence examined, and *held* not sufficient to show that F. was the agent of the pledgee of the note to collect the principal of the debt.

APPEAL from the district court for Hitchcock county. Tried below before NORRIS, J. *Reversed with directions.*

*Flansburg & Williams*, for appellant.

*F. I. Foss, F. W. Button, B. V. Kohout and R. D. Brown, contra.*

DAY, C.


On September 1, 1888, Asa Trumbo obtained a loan of \$700 from the Loan & Guarantee Company of Hartford, Connecticut, and as evidence thereof executed his coupon bond, due September 1, 1893, in favor of said company, secured by a mortgage upon real estate in Hitchcock county. By the terms of the bond it was payable at the office of the payee in Hartford, Connecticut. The bond and mortgage were subsequently transferred to the appellant, who brought this suit to foreclose the mortgage. In the petition it is alleged that appellant is the owner and holder of the bond and mortgage for value before maturity. The defendant, James Widgery, who was a subsequent purchaser of the mortgaged premises, by his answer denied the ownership of the bond and mortgage by appellant and also pleaded payment on September 1, 1893, to F. I. Foss, who, it was alleged, was the agent of the



Loan & Guarantee Company. Upon the trial below found for the defendants, and decreed a discharge of the mortgage. To review the plaintiff has brought the case to this court.

There is no doubt but that the amount of the bond at the date of its maturity was paid to the plaintiff. In the pleadings the only question which need be considered is whether the appellant was the owner and holder of the bond and mortgage at the time of the payment. The theory upon which the case was tried in the lower court was that appellee was not the owner of the bond and mortgage for value, but that the payment was the property of the Loan & Guarantee Company. The payment to Foss as the agent of the latter was a discharge of the debt.

It was shown beyond dispute that the note and mortgage were transferred to the appellant on September 1, 1888, under and in pursuance of an agreement between the Loan & Guarantee Company and the appellee, made on January 1, 1886, by the terms of which the appellee pledged the note and mortgage as a pledge or collateral for the payment of certain debenture bonds of the Loan & Guarantee Company. This agreement is quoted in the opinion and will not be set out here. It is set out in full in the opinion construed with reference to facts almost identical with those in the case at bar in *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb., 166, 85 N. W. Rep., 59. In that case, the question as to whether the appellee was entitled to the rights and privileges of a holder for value before maturity was said: "The contract between the loan company and the trust company [appellant], quoted above, made the trust company the holder for this mortgage as security for the payment of the debt of the loan company. The note and mortgage were in pledge, that fact entitled the holder, the trust company, to all rights and privileges of a holder for value before maturity."



Connecticut Trust & Safe Deposit Co. v. Trumbo.

The testimony also showed that after the appellant took possession of the bonds, coupons and mortgage, the interest upon the debenture secured thereby was paid by the Loan & Guarantee Company and the appellant, as provided by the terms of the agreement, cut from the collateral notes in its possession, among them the Trumbo note, the due interest coupons and surrendered them to the Loan & Guarantee Company, who forwarded them to Foss for collection. In collecting these coupons, Foss acted as the agent of the Loan & Guarantee Company. There was no correspondence or business transactions whatever between Foss and the appellant nor was there any testimony tending to show that Foss or the Loan & Guarantee Company were acting as the agents for the appellant in making the collection. Were this a contest between the defendant and the Loan & Guarantee Company we would have no hesitancy in holding that Foss was its agent and authorized to collect the principal upon the debt, the facts would then have brought it within the rule announced in *Root v. Fast*, 58 Neb., 498. But the facts proved are not sufficient to show that either the Loan & Guarantee Company or Foss was the agent of the appellant to collect the principal sum due upon the loan, or that any act of the appellant would justify the defendants in relying on Foss's authority to act as agent of appellant.

The record in the case now before us is substantially a duplicate of the record in *Connecticut Trust & Safe Deposit Co. v. Fletcher*, *supra*, and we consider that case decisive of the questions here presented.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded with directions to enter decree for plaintiff for amount due upon the note and mortgage.

HASTINGS and KIRKPATRICK, CC., concur.

The judgment of the district court is reversed, and the cause remanded with directions to enter decree for amount due upon note and mortgage.

REVERSED WITH DIRECTIONS.



Buck v. Hogeboom.

DAVID R. BUCK V. RICHARD HOGEBOOM, BY LOUIS LESIEUR,  
GUARDIAN.

FILED MAY 8, 1902. No. 9918.

Commissioner's opinion. Department No. 1.

1. **Appeal and Error: INSTRUCTIONS: COMPLAINT EN MASSE.** Complaint *en masse* of refusal of five instructions not considered where it is apparent that at least two of them were properly refused.
2. **Appeal and Error: INSTRUCTIONS:** An instruction identical in substance with one asked by the complaining party furnishes no grounds of error.
3. **Broker: RIGHT OF OWNER TO SELL: INSTRUCTIONS: COMMISSION.** Where party claims compensation as real estate broker for procuring a purchaser of lands and no exclusive right of sale was claimed, an instruction to the effect that the seller had a right to trade his own property, and that if the broker was not instrumental in bringing about the making of a contract, he could recover no commission on it, *held* proper.
4. **Broker: INTEREST IN CONTRACT: BONA FIDES: INSTRUCTIONS.** Where evidence tended to show an interest in the contract of purchase on the part of real estate broker, instruction that he must, to entitle him to commissions, act in good faith and in the interest of his employer, *held* not erroneous.
5. **Appeal and Error: INSTRUCTIONS: PREPONDERANCE AND WEIGHT OF EVIDENCE.** Not error to couple with instruction as to preponderance of evidence a correct statement of proper tests as to its weight.
6. **Appeal and Error: TRANSACTIONS IN DISPUTE: FINDINGS.** The trial court's determination, as to what transactions are sufficiently connected with those out of which the matter in dispute arose to be considered by the jury in passing upon it will not, unless clearly wrong, be disturbed.
7. **Guardian and Ward: ACTION BY: ABSENCE OF PLAINTIFF: FINDING OF INSANITY AS REASON FOR ABSENCE.** Where an action is carried on by a guardian, it is not error to allow a showing of his appointment and of a finding that plaintiff is insane solely to account for the latter's absence.
8. **Broker: COMMISSION: EVIDENCE.** Evidence found sufficient to sustain verdict for plaintiff.

OPINION upon reinstatement after cause had been stricken from the docket.

Buck v. Hogeboom.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Judgment below affirmed.*

*Martin Langdon*, for plaintiff in error.

*John P. Breen*, contra.

HASTINGS, C.

This action was originally instituted in the county court for Douglas county and thence taken on appeal to the district court. Plaintiff's claim in the action was for \$250 on account of rents collected for houses in Omaha as is alleged by defendant in the capacity of agent for plaintiff, Hogeboom. The defendant admitted collecting the rents to the amount of \$223.25, but claimed to have paid out \$81.01 for repairs; that he was entitled to \$23 commission for collecting the rents and \$10 for his services in connection with the repairs. He also set up a counter-claim for \$450 for procuring a purchaser for certain lands in township 13, range 14 east of the 6th P. M. Because of this counter-claim he alleged there was due him, after deducting all the plaintiff was entitled to on account of the rents collected, the sum of \$340.26. Plaintiff in reply denied listing the real estate for sale; denied employing the defendant to sell or exchange lands, and alleged that the defendant and one Campbell, his partner, and Campbell's wife sought out the plaintiff for the purpose of procuring an exchange of worthless real estate for some valuable lands of the plaintiff and fraudulently induced the latter to enter into a contract for such purpose; that in these negotiations defendant was acting in his own behalf and not that of the plaintiff; that he did not introduce the plaintiff to Campbell or to his wife, and denied generally the defendant's counter-claim. The jury returned a verdict for plaintiff for \$155.77 and found against defendant's counter-claim. From a judgment on the verdict, after the overruling of motion for new trial, the defendant brought error in this court.

There are twenty-seven assignments in the error, but the defendant, in his brief, complains of certain instructions given by the court, and of five others asked by the defendant, and of one in the admission of testimony, and that the error is supported by the evidence.

So far as the refusal of the instructions the exception is to the refusal of all five *en banc* complaint as to their rejection can not be considered all of the instructions should have been given. *v. State*, 60 Neb., 380. Instructions 2 and 4 should have been properly refused. The second instruction to allow defendant's counter-claim if they failed to procure a new contract between plaintiff and defendant on April 27, 1893, and the fourth instruction defendant was entitled to recover if he made no procuring the new contract of April 27. Both other issues and were rightly refused.

Instructions 6, 11, 12, 13 and 14, given by the court excepted to separately by the defendant and were sustained. So far as regards the sixth instruction, it is possible to see how this could have prejudiced the plaintiff and it is in substance the same as the first instruction asked by him. It is to the effect that a real estate agent is entitled to his commission if he gets a purchaser and able to take the property at the terms on which it was left with him for sale. In the form given by the court was at least as favorable to the defendant as the one which he had requested it, and he can complain of it in this respect.

The 11th instruction told the jury that the plaintiff himself retained the right to trade and dispose of the property; it also told the jury that if they found evidence that defendant did not bring the purchaser or her husband to plaintiff's notice, and that plaintiff himself knew and talked with either or both of them about the proposed trade before the defendant told them, nothing should be allowed on the count.

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It is complained that this took away from the jury the question of Mr. Buck's exclusive right to sell the property. Such objection is not well taken, for the defendant made no claim of any exclusive right. It is further complained that this is equivalent to instructing the jury that, if plaintiff had any previous acquaintance with the proposed purchaser, this would deprive defendant of his commission. The instruction certainly bears no such interpretation and seems to be fairly applicable to the evidence. There was evidence tending to show some years' acquaintance on the part of the plaintiff with the proposed purchaser's husband, and negotiations for a trade of lands running back of the time the defendant claims the lands were listed with him for sale.

The 12th instruction, also complained of, told the jury that no commission could be recovered unless the agent acted with entire integrity and good faith, nor if the agent was acting in the interest of the proposed purchaser and against that of his principal, Hogeboom. There was evidence tending to show that the defendant had an interest in the proposed purchase and was to have received some portion of the lands which he claimed were listed with him for sale. It is true that there is a dispute as to whether or not the contract by which this interest arose was a separate transaction, but there is evidence tending to show that both were really one transaction; that the lands had all been listed at the same time and that the supposed service had relation to both transactions.

The 14th instruction is complained of by the defendant because the court, in connection with advice to the jury as to what is a preponderance of evidence, took occasion also to tell the jury what circumstances might be taken into consideration in weighing it; that it is not alone to be determined by the entire number of witnesses, but also by their means of knowledge, conduct and demeanor in testifying, their interest or lack of interest, if any, in the suit, the probability or improbability of their statements, and the facts and circumstances shown at the trial which

might go to determine the weight of their evidence impossible to see how the joining of this with as to the necessity of a preponderance could have a misleading effect and the instruction seems objectionable in itself. The jury were told in instruction that they were to pass on the credit of the witnesses and determine the weight of the evidence.

Complaint is made of the admission of Exhibit 1 is a contract between the plaintiff and the defendant together with John M. Campbell, for the sale and conveyance of certain lands which formed a part of those lands owned by the defendant as having been listed with him for sale at \$75 per acre. The contract itself is the other one made with Emma Campbell on which the commissions are claimed. It recites that the latter was sold on the same date and described the premises purchased as the remainder of a tract embraced in a contract with Emma Campbell. There is evidence to show that the disposition of the entire tract was the result of the conditions of any transfer of a portion of the land of Campbell. It is clear that it was competent for the jury to consider the contract shown in Exhibit 7 in connection with that shown by the defendant in Exhibit 1 and that the counter-claim for commission was based, and a verdict for the jury was warranted in finding that they were both parts of the same transaction.

Complaint is also made of the admission of Exhibit 2 tended to show roughly the relative positions of several tracts of land involved. No good reason is given why it is not competent for the purpose for which it was introduced and sufficiently accurate to answer the purpose. It contained information of importance and was verified sufficiently to indicate its truthfulness for such use.

Complaint is also made as to the admission of Exhibit 3 a copy of the proceedings finding the plaintiff incompetent and appointing a guardian for him; this was admitted and expressly, to account for his absence and for

that a guardian had appeared for him at defendant's request to carry on the action. The jury were told clearly that this was the only purpose of this evidence.

Complaint is also made of the showing in evidence of a mortgage by plaintiff to Emma Campbell for \$7,500, which was a part of the transaction in the proposed exchange of lands. It is impossible to see how any error could be predicated upon the admission of this mortgage in view of the fact that good faith and acting in plaintiff's interest on the part of the defendant in making the exchange with Emma Campbell are expressly denied in the reply and are among the issues in this case. It is claimed that this mortgage was merely to secure the performance by plaintiff of his part of the agreement for an exchange and that the arrangement for it by defendant was one of the badges of his lack of good faith in the transaction.

The finding of the jury as to the defendant's right to this \$450 commission claimed by him seems to be in accordance with the weight of the evidence and the fair inference to be drawn from the circumstances surrounding the transaction, and it is not believed that there is any prejudicial error in the several matters complained of.

It is recommended that the judgment be affirmed.

**DAY and KIRKPATRICK, CC., concur.**

**AFFIRMED.**

**NOTE**—January 22, 1902, the above cause was stricken from the docket in this court because of a failure to properly revive the action after the death of one of the parties. The opinion in which the case is stricken may be found in 63 Neb., 672. March 18, 1902, orders of revivor, reinstatement and rehearing were made and a resubmission was had resulting in the opinion reported above.—**REPORTER.**



Boyd v. Pape.

JAMES BOYD, APPELLANT, v. FREDERICK W. PAPE, APPELLEE.

FILED MAY 8, 1902. No. 10,379.

Commissioner's opinion. Department No. 2.

1. **Mortgage Foreclosure: PAYMENT TO AGENT SUFFICIENT: CANCELLATION.** When the money for the payment of a note secured by mortgage has reached the hands of an agent authorized to collect it, the debt is paid, and the mortgagor is entitled to have the mortgage, given to secure the debt, canceled,
2. **Mortgage Foreclosure: PAYMENT: SUFFICIENCY OF EVIDENCE.** The evidence examined, and *held* sufficient to sustain the decree of the trial court.

APPEAL from the district court for Boone county. Tried below before ALBERT, J. *Affirmed.*

*Charles Riley and Flansburg & Williams, for appellant.*

*J. Dayton Stire, contra.*

OLDHAM, C.

On December 5, 1888, Maggie Huetter and John Fredrick Huetter obtained a loan from the Globe Investment Company of Boston, Massachusetts, in the amount of \$1,150, due in five years from that date, with interest at the rate of six per cent. per annum, interest payable semi-annually. To obtain this loan they gave the Globe Investment Company their note secured by a mortgage on certain lands in Boone county, Nebraska. On or about the 20th day of October, 1892, the Huetters sold and conveyed this real estate subject to this mortgage to the defendant, Fredrick W. Pape. This note and mortgage was sold and assigned by the Globe Investment Company, for a valuable consideration, before maturity, to John Stuart & Co., Limited, of Manchester, England, and by the latter company sold and assigned to James Boyd, the plaintiff, also for a valuable consideration and before maturity. There was no notice given to the Huetters or to the defendant, Pape, of either of these assignments, nor is there any claim made that either had knowledge thereof. At the maturity

of the note Pape paid this debt in full to the Globe Investment Company, as he had been notified to do by it. This payment was made in December, 1893, but the money was not turned over to John Stuart & Co. by the Globe Investment Company. With this condition of affairs the Globe Investment Company in September, 1895, went into the hands of a receiver and was practically insolvent at the time. With all hopes of collecting the money from the Globe Investment Company gone the assignee of this note and mortgage began this action in the district court for Boone county, Nebraska, for the purpose of foreclosing the mortgage on the land. Upon a trial thereof a decree was rendered in favor of the defendant, annulling and cancelling the mortgage and the cloud created thereby upon the title removed, as prayed for in his answer. From this decree the plaintiff appeals to this court.

This decree is based upon the theory that the Globe Investment Company was the agent of John Stuart & Co., Limited, for the collection of this debt, and this is the main question presented, as Mr. Boyd the plaintiff swears in his testimony that "I instructed my bankers who held the bond and mortgage to send the same to Messrs. John Stuart & Co., Limited, for collection, and they so sent it on the 13th day of November, 1893." The testimony in this case is elaborate, clear, positive and in the main not conflicting. The evidence shows, in substance, that the Globe Investment Company of Boston, Massachusetts, made loans in the United States secured by real estate mortgages; that John Stuart & Co., Limited, of Manchester, England, were dealers in this class of securities and purchased from the Globe Investment Company a large number of these mortgages, including the Huetter mortgage; these transactions covered a number of years and amounted to over \$1,000,000; that John Stuart & Co. sold these mortgages to their customers, or, as its officer termed it, "to its clients," and as a part of its business looked after the clients' interest and principal when due and remitted the amounts to the holders of the security.

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This mortgage in question is what is termed by the investment company and the Stuart company as between themselves "a guaranteed security" and was deemed so by virtue of the following contract indorsed on the back of the coupon note or bond, as follows:

"GUARANTY.

"In consideration of value received the Globe Investment Company hereby guarantees the payment of each coupon hereto attached at maturity, and the payment of this principal note within two years after maturity—with interest after maturity—at the rate of six per cent. per annum, payable semi-annually; provided said company shall have the right to purchase this note at any time by paying the holder hereof its face value and accrued interest at date of payment; and the neglect or refusal of said holder to accept such payment and assign and deliver to said company this note and the mortgage given to secure it, shall release said company from all further liability hereon.

"In witness whereof the said Globe Investment Company has caused its corporate seal to be hereto affixed and this guaranty to be signed in its name and behalf by its treasurer this eighteenth day of December, 1888.

"[Seal.]

GLOBE INVESTMENT COMPANY,

"By ALLISON Z. MASON, *Treasurer.*"

The notes and mortgages were each indorsed in blank by the investment company and then delivered to John Stuart & Co., Limited, and when resold by it the name of the purchaser was inserted in the blank and the indorsement then would show on its face as a direct indorsement from the investment company to this individual purchaser, but in fact this blank was filed by the Stuart company and the investment company did not know the individual purchaser and had no business relations with him. The John Stuart & Co., Limited, in its own name still collected the interest and principal when due on these mortgages, and when so doing it did not apply to the mortgagors or the

owners of the land mortgaged, but in each instance the collections were made through or from the Globe Investment Company. It collected nine of the coupons (all but the last) in this manner and the coupons were returned to the payor shortly after each payment by the Globe Investment Company.

The testimony of Allison Z. Mason, at one time treasurer and afterwards president of the Globe Investment Company, is before us, in which he testified in part as follows:

Q. Please state fully just what the Globe Investment Company did in caring for the loans sold to John Stuart & Co. and by them sold to the investors in England or elsewhere.

A. The company collected the interest, paid the taxes, attended to the insurance, examined the property, collected the principal, foreclosed the mortgage when necessary, sold the land after foreclosure, notified the borrower of interest or principal due.

Q. What part of the work in care of the loan as described by you, if any, did John Stuart & Co. do?

A. No part.

Q. Does your statement in regard to the care of loans sold to John Stuart & Co. include each and every loan sold them?

A. Yes, sir.

Q. In those loans sold to John Stuart & Co. did John Stuart & Co. have any direct communication with the borrower?

A. No, sir.

He further testified that he visited John Stuart & Co., Limited, a number of times in England and the three principal managers, naming them, had frequently visited the offices of the Globe Investment Company in Boston and at these various times these practices in caring for loans were discussed by the officers of the respective companies and were fully understood and approved by the managers of the John Stuart & Co.; that they had access to the books of the investment company and that they and

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their clients owned at least fifteen per cent. of the capital stock of the Globe Investment Company. This testimony is corroborated by J. Lowell Moore, the treasurer of the Globe Investment Company.

The only apparent conflict that we find in the entire testimony is found in the testimony of Richard Heaton Smith, taken at Manchester, England, on behalf of plaintiff, which, by the way, does not show what relation he sustained to John Stuart & Co., Limited, nor his means of knowledge, but he testifies as follows:

Q. Describe the course of dealing between John Stuart & Co., Limited, and the Globe Investment Company in the matter of the collection of interest coupons.

A. So long as John Stuart & Co., and John Stuart & Co., Limited, continued to buy securities of the Globe Investment Company, that is up to the close of 1890, they remitted coupons and past due mortgages direct to the Globe Investment Company and the Globe Investment Company received the same as cash remittances, crediting the account of John Stuart & Co., or John Stuart & Co., Limited, for the same.

Q. Then up to the time of which you speak there was no question of collecting notes or anything of the kind; the Globe Investment Company simply bought them back at maturity?

A. Yes.

He further says that in December, 1890, John Stuart & Co., Limited, appointed a firm in New York city as its agents, and on September 4, 1891, changed this agency to Boston by making the firm of Kidder, Peabody & Co., of Boston, its agents. This agency, the evidence clearly shows, was not created for the purpose of collecting the interest and principal of these loans when due from the borrower, but was for the purpose of collecting each as it matured from the Globe Investment Company. Prior to the establishment of this agency, John Stuart & Co. conducted its business by its own officers directly with the Globe Investment Company; after the establishment of this agency

it conducted its business with the Globe Investment Company through this agency. The character of the business conducted was the same in each instance. The nature of the business was not changed, but the conduit by which it was carried on was changed from direct, by itself, to indirect, through its agency, and this was all the change made, and for this reason this agency is of no consequence in the determination of this controversy. Any suggestion to the contrary should be silenced by a perusal of the following letter:

"MANCHESTER, 18th April, 1894.

"*Messrs. Globe Investment Co., Boston, Mass.*

"DEAR SIR: We had this pleasure on the 14th inst. and are since without any of your valued favors.

"D. 985; 5,4485. Holders are trustees. They ask what prospects there are of repayment. If you think that these should be renewed and borrower unable to pay them off, kindly advise us how interest has been kept up and if all taxes are paid so that we may be able to give such information when asking them to grant renewals.

"FOR JOHN STUART & CO., LIMITED.

"THOMAS WORTHINGTON."

A significant fact about this letter is that it is speaking about the identical loan involved in this action. Its number is 5,4484. This letter was written long after the establishment of this purported agency, in fact after the payment of this loan by Pape, and it would seem to show that John Stuart & Co., Limited, was still relying on the Globe Investment Company to conduct all business pertaining to these loans with the borrower, and in this respect it corroborates the testimony of the witnesses Mason and Moore, *supra*, on this point. This evidence clearly establishes the agency upon which the decree is based.

This conclusion disposes of the case, and therefore we do not deem it necessary to express any opinion on the question of the negotiability of the note under the peculiar form of indorsement set out in this opinion.

Willits v. Harlan County.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

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ED L. WILLITS V. HARLAN COUNTY.

FILED MAY 8, 1902. No. 10,682.

Commissioner's opinion. Department No. 1.

**Appeal and Error: JUDGMENT DESTOR NOT A PARTY TO ERROR PROCEEDINGS: JURISDICTION.** Where a judgment is entered in the district court in favor of a party to the proceedings, and error proceedings are prosecuted to this court without making the party to the error proceedings, this court has no jurisdiction to determine the correctness of the judgment.

**ERROR** from the district court for Harlan county, Nebraska, below before BEALL, J. *Petition in error dismissed.*

*John Everson*, for plaintiff in error.

*J. G. Thompson* and *W. S. Morlan*, contra.

KIRKPATRICK, C.

This is an error proceeding prosecuted from a judgment of the district court for Harlan county, in which it was judged that the Harlan County Agricultural Society was entitled to recover the sum of \$300 from Harlan county for the year 1897. The facts in the controversy, as stated, are: The Harlan County Agricultural Society, situated in Harlan county, held a county fair ever since from its organization in 1876 up to and including 1893, except the year 1894; and prior to July 13, 1897, presented to the county board a certificate, signed by its president and secretary, in the words following:

"To S. L. Roberts, clerk, Harlan county, Nebraska: I hereby certify that the Harlan County, Nebraska, Agricultural Society held its annual fair for the year 1896, September 9, 10, 11, and 12, 1896, at Orleans, Nebraska; that

of \$50 has been raised and is now in the hands of the treasurer of the society, and the said agricultural society is entitled to the appropriation provided and directed by law from the county treasury.

"M. B. HOLLAND, *President.*

"D. R. WAGONER, *Secretary.*"

The county board, on July 13, 1897, acting on this claim, allowed the society \$300.

It further appears that a second agricultural society, known as the Harlan County Fair Association, filed a similar certificate, and was allowed \$50. From the action of the county board allowing these two claims plaintiff in error, who was a taxpayer of the county, appealed to the district court. The action allowing \$50 to the Harlan County Fair Association was reconsidered and the claim disallowed, thus eliminating that part of the controversy.

In the district court, plaintiff in error, by order of court, was required to file a petition, setting up his reasons why the claim of the Harlan County Agricultural Society should not have been allowed. To this petition the county of Harlan filed an answer, admitting the official character of the board and the allowance of the claim, and denying generally other matters pleaded in the petition. Trial was had to the court, without a jury, and resulted in a judgment that the agricultural society was entitled to recover the sum of \$300 allowed by the board. From this judgment plaintiff in error brings the case to this court for review. No brief is filed by defendant in error.

It is apparent that this court has no jurisdiction of the question involved. In a controversy of this character the interests of the county and the appellant taxpayer are identical, and no issue could properly be raised between them. The real controversy in the case was between the claimant, the agricultural society, and the county. As the case stands upon the record presented, the agricultural society is not even a party to the proceedings, and does not in any way appear in this court. A judgment having been entered in the district court in favor of the agricultural



*Meeker v. Waldron.*

society, it is clear that the validity of such judgment should not be examined upon error proceedings in this case, but should be out by proper proceedings making the agricultural society a party herein. This has not been done; the agricultural society is not made a party by the petition in error. The writ of summons in error has been served upon it, and no answer has been no appearance herein by the society. It is recommended that the petition in error be dismissed.

HASTINGS and DAY, CC., concur.

PETITION IN ERROR DISMISSED.

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N. H. MEEKER, TRUSTEE, APPELLEE, V. HARVEY  
WALDRON ET AL., APPELLANTS.

FILED MAY 8, 1902. No. 11,041.

Commissioner's opinion. Department No. 2.

**Chattel Mortgage Foreclosure:** Issues examined, and found similar in all respects with the issues determined by the case of *Meeker v. Waldron*, 62 Neb., 689, 87 N. W. 2d, which case is approved and followed.

APPEAL from the district court for Cass county, Iowa, below before RAMSEY, J. *Affirmed.*

*Samuel M. Chapman*, for appellants.

*Strode & Strode*, contra.

OLDHAM, C.

In this case the appellee, who styles himself in the petition "N. H. Meeker, Trustee for and on behalf of Finlay, Gertrude Cutler, Mrs. Sampson, first known, Bank of Cass County, a corporation, S. J. Robert Gullion, and L. C. Sterling," filed a petition in the district court for Cass county on the 7th day of

1898, the main object being to foreclose a chattel mortgage given by the appellant, Harvey R. Waldron, to one Joseph H. McKinnon.

The petition alleges, in substance, that the appellant, Waldron, made and delivered his several promissory notes as follows: One to Caroline Finlay for \$600, dated April 4, 1896, due ninety days from date; one to Gertrude Cutler for \$550 dated January 28, 1896, due in one year from date; one to Mrs. L. C. Sterling for \$500 dated March 12, 1896, due one year from date; one to Mrs. E. M. Sampson for \$400, dated August 12, 1896, due one year from date; one to the Bank of Cass County for \$350, dated July 12, 1897, due one hundred and twenty days from date, and one to S. L. Sears for \$1,000, no date nor time of payment fixed; and two notes to Robert Gullion, one for \$413 and one for \$300, each dated April 1, 1896, and due six months after date. After setting out the notes above indicated *in hæc verba*, with the usual allegations that no part of said notes has been paid, etc., he further alleges that "Your petitioner further represents unto the court that J. H. McKinnon, whose name appears on each of the above described notes, signed the same and each of them as surety and that said Harvey R. Waldron, principal, for the purpose of securing the payment of the said notes and each of them upon their maturity and indemnifying the said J. H. McKinnon for becoming surety thereon, on or about July 22, 1896, at the instance and request of the payees of said notes, executed and delivered his certain chattel mortgage to the said J. H. McKinnon upon the following described property, being the property of the said Harvey R. Waldron situated in Cass county, Nebraska, to wit:" Here follows a description of the property, after which come the further allegations:

"By the terms and condition of the said mortgage it was provided as follows: 'Above mortgage is given to secure the said McKinnon for signing notes: Caroline Finlay, \$600; Gertrude Cutler, \$550; Mrs. Sampson, \$400; Bank

**Meeker v. Waldron.**

of Cass County, \$400; S. L. Sears, \$1,000; Robert Gullion, two notes, \$713, together with interest, also Sterling note, \$500.'

"By the terms and conditions of said mortgage it was provided 'that if the said Harvey R. Waldron shall pay to the said Joseph H. McKinnon, his heirs, assigns, etc., his one certain promissory note dated July 22, 1896, and described as follows, to wit: one for \$4,163 payable July 22, 1897, with interest at the rate of ten per centum per annum according to the tenor thereof, or pay the notes secured by the said J. H. McKinnon's name, then these presents to be void, otherwise to be in full force and effect.' "

The petition further alleges the filing of the mortgage in the office of the county clerk of Cass county, and then this further allegation: "Your petitioner further represents that on or about the 11th day of August, 1897, the said J. H. McKinnon assigned, set over and transferred to this plaintiff, as trustee for and on behalf of Caroline Finlay, Gertrude Cutler, Mrs. E. M. Sampson, Bank of Cass County, S. L. Sears, Robert Gullion and L. C. Sterling, said mortgage and all rights and interests therein or by virtue thereof, with full authority to foreclose said mortgage and apply the proceeds resulting therefrom upon the original indebtedness thereby secured to-wit, the notes herein before set out." The further allegations of the petition relate to the condition and mismanagement of the mortgaged property and are not material to this inquiry.

Waldron filed an answer, the material things in which are that he denied that Meeker is the trustee of the several alleged creditors and that he shows no rights either equitable or otherwise in his petition to prosecute or maintain this action; and that said mortgage was an indemnity mortgage and was given to secure a note for \$4,163 only, upon which the said Meeker does not pretend to ask for foreclosure in his petition.

To this answer Meeker filed a general denial. On these

issues trial was had, which resulted in findings and judgment for plaintiff foreclosing the chattel mortgage as prayed for in the petition, from which Waldron appeals to this court.

Every issue involved in this case has been fully determined by this court on issues identical in character between the same parties in the case of *Meeker v. Waldron*, 62 Neb., 689, 87 N. W. Rep., 539, and on the authority of that decision this case should be affirmed, and we so recommend.

BARNES and POUND, CC., concur.

AFFIRMED.

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MICHIGAN MUTUAL LIFE INSURANCE COMPANY, APPELLEE,  
v. FRITZ KLATT ET AL., IMPEADED WITH JAMES E.  
EBERSOLE, ADMINISTRATOR OF THE ESTATE OF FRED  
KLATT, DECEASED, APPELLANTS.

FILED MAY 8, 1902. No. 11,072.

Commissioner's opinion. Department No. 1.

Mortgage Foreclosure: PARTY IN INTEREST: LEGAL CAPACITY TO SUE:  
EVIDENCE. Evidence examined, and held insufficient to sustain the  
judgment of the trial court.

APPEAL from the district court for Douglas county.  
Tried below before FAWCETT, J. *Affirmed.*

*Frank Heller*, for appellants.

*John D. Ware*, pro se, as guardian ad litem.

*Tibbets Bros., Morey & Anderson*, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Douglas county by the Michigan Mutual Life Insurance Co. against Fritz Klatt and William Klatt, heirs, and against James E. Ebersole, administrator, of the estate of Fred Klatt,

## Michigan Mutual Life Ins. Co. v. Klatt.

deceased, and others, to foreclose a mortgage claimed to have been executed by Fred Klatt in his lifetime to the Mutual Investment Company of Omaha for the sum of \$2,500. The petition is in the usual form, and pleads that appellee, the Michigan Mutual Life Insurance Company, for a valuable consideration and before maturity, purchased the note and mortgage in suit from the payee, the Mutual Investment Company of Omaha, and that the same was duly assigned and delivered to appellee. Fritz Klatt, being a minor, John D. Ware was appointed his guardian *ad litem*, and filed an answer, which pleads that plaintiff in error is not the owner of the note and mortgage set out, and, in addition, pleads the want of legal capacity of the appellee to maintain the suit, and a general denial. The answer of James E. Ebersole, administrator, pleads the want of legal capacity in appellee to maintain the suit, and a general denial. To these answers a general denial was filed for reply. Trial was had, which resulted in a decree of foreclosure, from which an appeal is prosecuted to this court.

The only question presented is whether or not the evidence is sufficient to support the decree. The evidence is very brief, and tends to establish, first, that Fred Klatt in his lifetime executed the note and mortgage in suit, and delivered them to the Mutual Investment Company of Omaha; second, that the amount due on the note and mortgage, including principal and interest at the time of the suit, was \$3,050.55, and that no action at law had been brought to recover any part of the amount alleged to be due. The principal objection is that there is no evidence to support the allegations of the petition that appellee was the owner of the note and mortgage in suit. The only evidence in the record tending to establish this allegation in the petition is the evidence of one W. H. Russell, who appears to be attorney for appellee, who testified to having the note and mortgage in his possession. While this witness does not swear that he is the attorney for appellee and that he has the note and mortgage in his possession

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representing the appellee, the trial court no doubt took notice of the fact that he was the attorney for appellee, and no doubt regarded his possession of the note and mortgage as sufficient evidence to create a presumption of ownership in appellee. While this evidence is very meagre and unsatisfactory, we are of opinion that, where no evidence is offered tending to contradict the ownership of the note and mortgage in suit in appellee, evidence of possession alone is sufficient to support the judgment. It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

AFFIRMED.

Opinion on rehearing follows.

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MICHIGAN MUTUAL LIFE INSURANCE COMPANY, APPELLEE,  
v. FRITZ KLATT ET AL., IMPLEADED WITH JAMES E.  
EBERSOLE, ADMINISTRATOR OF THE ESTATE OF FRED  
KLATT, DECEASED, APPELLANTS.

FILED NOVEMBER 6, 1902. No. 11,072.

Commissioner's opinion. Department No. 2.

1. Bills and Notes: POSSESSION AS EVIDENCE OF OWNERSHIP. Possession of a promissory note is *prima facie* evidence of its ownership.
2. Case Distinguished. *Grant v. Clarke*, 58 Neb., 72, distinguished.

REHEARING of case reported *ante*, page 870.

APPEAL from the district court for Douglas county. Tried below before FAWCETT, J. *Former opinion adhered to and judgment below reaffirmed.*

*Frank Heller*, for appellants.

*John D. Ware*, pro se., as guardian *ad litem*.

*Tibbets Bros., Morey & Anderson*, contra.

## OLDHAM, C.

The former opinion in this case delivered by KIRKPATRICK, C., will be found reported *ante*, page 870, and in 90 N. W. Rep., 754. A full statement of the case is contained in this opinion. Appellants have been granted a rehearing on the question of the sufficiency of the testimony to sustain the judgment. The petition in this case, after alleging the execution and delivery of the negotiable bond and mortgage in suit to the Mutual Investment Company, of Omaha, Neb., by defendants' intestate, alleges "that for a valuable consideration and in the ordinary course of business" the Mutual Investment Company sold, assigned and delivered to the plaintiff herein the said bond and mortgage, and that "the plaintiff is now the legal owner and holder thereof." Appellants' answer in the court below was a general denial. As set forth in the original opinion, appellee, by its attorney, produced the bond and mortgage and introduced the same in evidence at the trial of the cause without proof of the indorsement on the bond. It also proved the execution and delivery of the original bond and mortgage by appellants' intestate to the Mutual Investment Company, and the amount due thereon, and introduced evidence tending to show that no action at law had been instituted for the collection of the debt, or any part thereof, and then rested.

It is urged that this proof is not sufficient to sustain the judgment of the trial court, finding the amount due on the bond and decreeing the foreclosure of the mortgage, and that the opinion of the learned commissioner at the former hearing of this cause is in conflict with the decision of this court in the case of *Grant v. Clarke*, 58 Neb., 72, 78 N. W. Rep., 364, and cases therein cited. *Grant v. Clarke* was a suit by the indorsee of a promissory note for the foreclosure of the note and mortgage in which the petition alleged that "by the indorsement of Martha M. Ish and the indorsement of H. Ambler plaintiff had become the owner of said notes, and entitled to foreclose the mortgage secur-

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ing the same," but no allegation was made that plaintiff was the owner of the note either by purchase for value or the delivery thereof. In the trial of the case plaintiff introduced the note, but failed to prove the indorsements thereon, consequently the court held that the evidence was not sufficient to support the decree foreclosing the mortgage. The cases cited in support of this decision, so far as they throw any light on the questions at issue, simply hold that the mere introduction of an instrument in evidence does not carry with it the indorsements thereon, and this is all, as we understand it, that the court determined in the cases just referred to. In the case at bar, plaintiff does not allege title to the bond and right to foreclose the mortgage by indorsement alone, but alleges title by purchase and delivery as well as by assignment. On the trial of the case plaintiff produced the bond and mortgage and introduced the same in evidence. The only question to determine is whether or not the possession of a negotiable bond and mortgage by the alleged owner thereof and the introduction of the same in evidence is *prima facie* proof of the ownership thereof. We have an answer in the affirmative of this proposition by a decision of our own court in *Greeley State Bank v. Line*, 50 Neb., 434, and consequently need not pursue the investigation further.

We therefore conclude that the opinion of the learned commissioner at the former hearing of this cause is right and should be adhered to.

BARNES and POUND, CC., concur.

FORMER OPINION OF AFFIRMANCE ADHERED TO.

POUND, C., concurring.

In *Greeley State Bank v. Line*, 50 Neb., 434, it is held that a promissory note secured by mortgage may be assigned by sale and delivery without any indorsement or formal written assignment, and that one who holds by the equitable title based on such a sale and delivery may main-



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tain a foreclosure suit. The plaintiff in this case owned the property by sale and delivery. Has it made good proof thereof? We are cited to *Sharmer v. M. Neb.*, 509, to show that it did not. But in this case the production in court were relied on that certain notes, unindorsed, had been pledged. There was other evidence tending to show that the notes had not been pledged, and the person producing them was in no relation to the alleged pledgor that his custody was inconsistent with ownership and possession in the case. Hence that case is not applicable. No question of the plaintiff's title was raised at the trial in the case. The plaintiff produced the note and mortgage as evidence that he had, so far as appears, undisputed title thereto. The production thereof. There was no cross-examination of the plaintiff as to how such possession came about, and no attempt to impeach it. The rules of pleading that permit a general denial in foreclosure suits and encourage mortgagors to make such general denials, involving denial of their ownership of the property and acknowledged instruments, in the hope that by not hearing the plaintiff may omit some small point of fact or fail to make some element of his case sufficient to sustain it while the mortgagor sits back and offers no substantial defense, not to make the situation worse nor to encourage a meritorious defense, are unfortunate. The consequence of such a practice by undue technicality or by a scrupulous scrutiny in weighing the evidence a plaintiff produces in his formal proof in such cases.

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JOHN L. McCONNELL V. L. BETTMAN & CO.

FILED MAY 8, 1902. No. 11,224.

Commissioner's opinion. Department No. 1

**Landlord and Tenant: FURNISHING HEAT WITH BUILDING  
RELATED IN LEASE: CUSTOM: EVIDENCE.** Evidence by  
real estate dealers and managers, in general terms,  
that the use of a room was by custom in the city of Lincoln and

clude an agreement of the lessor to furnish heat, when he maintained a heating plant in the building, where each witness acknowledged that in cases of written leases it was usual to incorporate an agreement as to the matter, and no instance of such heating by the lessor without a stipulation to that effect in the case of a written lease could be cited, held insufficient to uphold a verdict for defendant in an action to recover for furnishing such heat to a tenant whose written lease contained no such stipulation and who did not claim that any express agreement to furnish it was made.

ERROR from the district court for Lancaster county.  
Tried below before HOLMES, J. *Reversed.*

*A. S. Tibbets*, for plaintiff in error.

*Stevens & Cochran*, contra.

HASTINGS, C.

This is an action to recover \$500 for steam heat for the store-room at No. 1031 O street, in Lincoln, during the two years from February 1, 1892, to February 1, 1894, at \$250 per year. From a verdict and judgment for defendants, plaintiff brings error.

On January 22, plaintiff was allowed to file a brief out of time, and obtained leave to do so as to two questions: First, the construction of the lease under which the defendants held the premises, and, second, the sufficiency of the evidence to sustain the verdict in their favor. These questions alone will be considered.

The first is evidently of importance only as bearing on the second. The lease, in terms, makes no reference to the heat, except that it contains a provision that the tenant shall keep the steam pipes in repair. The only steam pipes in the building were heating pipes. Plaintiff alleges and testifies to an oral agreement by defendants to pay \$250 per year for heat. This agreement is denied in both pleading and testimony. The heating of the room by plaintiff is not denied; no attempt is made to prove any contract on his part to heat the room outside of the lease. A right to such heat under the lease

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is sought to be established by proof of custom to furnish heat with rooms in the case of steam heated buildings, and when the owner maintained a heating plant. So far as the plaintiff's assertion of the oral contract is concerned, there is evidence to sustain the jury's finding against him. So far as the existence of a custom in the city of Lincoln to furnish heat with the rooms under such circumstances, the evidence is not satisfactory. It appears clearly that such was the practice of plaintiff himself in regard to other rooms in the same building, but with no written lease in that case. Such a custom is testified to by the witnesses Stevens, Sizer, Mosely, Randall, Blair, Read and Muller, although all of them say it was usual to insert a stipulation for heat in leases and most of them admit that they knew of no instances of written leases where such heat was furnished without such an agreement in the lease. The non-existence of any such custom is testified to in very positive terms by three experienced real estate men, who assert that it is never usual to furnish heat, except when stipulated for in the lease. A considerable portion of the bill of exceptions embodying testimony of plaintiff, McConnell, seems never to have been placed before the jury. It is contended by the plaintiff that there is no evidence in this record to preclude his recovering for the heating which he admittedly furnished, except the showing as to this alleged custom. It is claimed that such custom is only attempted to be shown as a merely local one, that there is no attempt at a showing that it was either general or was known to defendant, who denies its existence *in toto*. It is claimed that there is nothing here which establishes with any conclusiveness the existence of a custom in the first place, and nothing whatever to show that it was known to plaintiff or that the contract was made with reference to it. It must be conceded that of direct testimony of knowledge on the part of McConnell of any such custom there is none. There is, however, the proof of his ownership and renting the building and of his own action in dealing with his tenant, Stevens. If the exist-

ence of such a custom in the renting of the premises under such circumstances in the city of Lincoln is conceded, there seem to be facts in this record sufficient to warrant the conclusion of the jury that McConnell was aware of it. In our view, however, the mere general statement of these several witnesses that there was such a custom when taken in connection with the lack of knowledge of any instance of its application in connection with a written lease, and their own statement in each instance that it was usual to put such a stipulation in the lease where written leases were made, makes the evidence of such a custom quite insufficient to uphold a finding that it existed and was a part of this contract.

The question seems to be whether heat was intended to be included in this lease when it was made. The evidence, as we have seen, is quite insufficient to establish any additional terms in this lease by means of any custom prevailing in the city in view of which it was claimed to be made. There is nothing else in the evidence by which such an agreement for heat could be incorporated into this lease.

Of course, all the facts and circumstances surrounding the making of the contract are admissible so far as they tend to throw light on its meaning. Among these is the rental value of the premises. Only one witness, however, D. W. Mosely, testifies as to the rental value of the rooms. He thought the rent, \$240 per month, the full rental value with heat, but he admitted that he did not know for what sums the rooms had rented before and subsequently, and that rents were higher in 1892 than since. A. D. Burr testified to making the lease; that defendants bought out one Simmons and were to have the rooms on same terms as Simmons did; that the lease was drawn in the same terms as Simmons's, and that the latter paid \$240 monthly and \$250 additional for heat yearly.

It is not denied that at the end of the first year the claim of plaintiff for the \$250 for heat during that time was urged. The uncontradicted testimony is that time

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was asked because business was bad. The evidence in this case seems insufficient to incorporate any stipulation to the effect into the agreement between these parties. It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

REVERSED AND REMANDED.

THOMAS CHICK, APPELLEE, v. J. K. IVES ET AL.  
PLAINTIFFS.

FILED MAY 8, 1902. No. 11,450.

Commissioner's opinion. Department No. 2.

1. **Wills: CONSTRUCTION: CONVERSION OF ESTATE INTO MONEY AT TIME OF CONVERSION.** Where the provisions of a will are of such a character as to amount to a positive direction to convert the testator's real estate into money or personalty, or where the construction of the will such intention of the testator is shown by implication, a court of equity will decree an equitable conversion of the real estate of the testator at the time of his death.
2. **Wills: CONSTRUCTION: INTENTION OF TESTATOR: HOW ASCERTAINED.** In the construction of a will the intention of the testator, as far as can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and a comprehension of all of the provisions of the will. The court will place itself, nearly as possible, in the position of the testator, at the time of his death, and, if lawful, enforce it.
3. **Wills: CONSTRUCTION: CONVERSION OF ESTATE INTO MONEY AT TIME OF CONVERSION.** Will examined, construed, and found to have effected an equitable conversion of the testator's real estate into money at the time of his death.
4. **Wills: CONVERSION OF ESTATE INTO PERSONALTY AT DEATH OF HEIRS IN REALTY.** In such a case the heirs have no interest in the real estate, as such; and a mortgage given by or to the testator upon and describing an undivided interest in the real estate, creates no lien thereon which can be enforced in a court of law or equity in case of foreclosure.

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**5. WILLS: MORTGAGES AND JUDGMENTS: ASSIGNMENTS BY HEIR: VALIDITY.**

If the mortgage and judgments set forth in the record were an assignment of the interest of Emma L. Ives in the estate (which is not decided), she having been paid her full share thereof, there was nothing on which the assignment could operate.

APPEAL from the district court for Saline county. Tried below before STUBBS, J. *Reversed and dismissed.*

*D. H. Flaherty*, with *James W. Dawes* and *Joseph R. Webster*, of counsel, for appellants.

The will effected a conversion of the land into money as of the time of the testator's death. *Arlington State Bank v. Paulsen*, 57 Neb., 717; *Weller v. Noffsinger*, 57 Neb., 455; *Penfield v. Tower*, 1 N. Dak., 216; *Gould v. The Taylor Orphan Asylum*, 46 Wis., 106; *Roy v. Monroe*, 47 N. J. Eq., 356; *Fahenstock v. Fahenstock*, 152 Pa. St., 56; *Effinger v. Hall*, 81 Va., 94; *Crane v. Bolles*, 49 N. J. Eq., 373, 378; *Power v. Cassidy*, 79 N. Y., 603; *Lent v. Howard*, 89 N. Y., 169; *Fisher v. Banta*, 66 N. Y., 468; *Anthony v. Rees*, 2 C. & J. [Eng.], 75; *Mower v. Orr*, 7 Hare [Eng.], 473; *Cookson v. Reay*, 5 Beav. [Eng.], 22; *McClure's Appeal*, 72 Pa. St., 414; *Jones v. Caldwell*, 97 Pa. St., 42; *Asche v. Asche*, 113 N. Y., 232; *Fraser v. United Presbyterian Church*, 124 N. Y., 479, 485; *Roland v. Miller*, 100 Pa. St., 47; *Loftis v. Glass*, 15 Ark., 680, 688; *Loughborough v. Loughborough*, 14 B. Mon. [Ky.], 549; *Cropley v. Cooper*, 19 Wall. [U. S.], 167, 174.

Whether the legal title passed to the executrix or descended at law, the heir could not convey or incumber it by mortgage. *Baker v. Copenbarger*, 15 Ill., 103, 58 Am. Dec., 600; *Brolasky v. Gally's Executors*, 51 Pa. St., 509; *Dodge v. Williams*, 46 Wis., 70; *In re Estate of Stevenson*, 2 Del. Ch., 197; *Gray v. Smith*, 3 Watts [Pa.], 289; *Penfield v. Tower*, 1 N. Dak., 216.

A judgment against the heir cannot attach as a lien upon the land nor will levy of execution and sale on such judgment pass title to a purchaser. *Roland v. Miller*, 100 Pa. St., 47; *Hunter v. Anderson*, 152 Pa. St., 386; *Paisley v. Holzshu*, 83 Md., 325.

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No act of the heir alone not concurred in by all the beneficiaries under the will can work a reconversion. *High v. Worley*, 33 Ala., 196; *De Vaughn v. McElroy*, 82 Ga., 687; *Fluke v. Fluke*, 16 N. J. Eq., 478; *McDonald v. O'Hara*, 144 N. Y., 566; *Evan's Appeal*, 63 Pa. St., 183; *Harcum v. Hudnall*, 14 Gratt. [Va.], 369; Pomeroy, Equity Jurisprudence [2d ed.], sections 1160 to 1176; Bispham, Principles of Equity, sections 311, 312, 320, 323; *Fahenstock v. Fahenstock*, 152 Pa. St., 56.

The existence of an active trust suspends the power of alienation by the heir. *High v. Worley*, 33 Ala., 196; *Penfield v. Tower*, 1 N. Dak., 216.

*F. I. Foss, B. V. Kohout and M. H. Fleming, contra.*

When a testator first devises his property absolutely, as Glade did in this case, and follows this with an express or implied direction to convert it into money, then the fee rests in the devisees and remains in them until the sale is actually consummated. Sugden, Powers [8th ed.], 112; *Doe v. Shotter*, 8 Ad. & El. [Eng.], 905; 3 Redfield, Wills, 136; *Beadle v. Beadle*, 40 Fed. Rep., 315; *Greenough v. Welles*, 10 Cush. [Mass.], 571; *Warneford v. Thompson*, 3 Ves. Ch. [Eng.], 513; *Hilton v. Kenworthy*, 3 East [Eng.], 553; *Schauber v. Jackson*, 2 Wend. [N. Y.], 13; *Compton v. McMahan*, 19 Mo. App., 494; *Crittenden v. Fairchild*, 41 N. Y., 289; 1 Pomeroy, Equity Jurisprudence [2d ed.], section 371.

The judgment lien, therefore, had something upon which to operate (*Ridgeway v. Underwood*, 67 Ill., 430), and the interest falling to the heir might be mortgaged. *Dorsey v. Hall*, 7 Neb., 460; 2 Story, Equity Jurisprudence [13th ed.], section 1021; 4 Kent, Commentaries, 144; 1 Powell, Mortgages, 17-23.

A conversion of the property never occurred. *Compton v. McMahan*, 19 Mo. App., 494; *Crittenden v. Fairchild*, 41 N. Y., 289; 1 Pomeroy, Equity Jurisprudence [2d ed.], section 391; *Lancaster v. Thornton*, 2 Burr. [Eng.], 1028; *Beadle v. Beadle*, 40 Fed. Rep., 315.

For the will to operate as an immediate conversion, it must appear in terms or by necessary implication that the testator intended the property to be converted and at all events. *King v. King*, 13 R. I., 501; *Hobson v. Hale*, 95 N. Y., 588; *Ducker v. Wear & Boogher Dry Goods Co.*, 34 N. E. Rep. [Ill.], 558; *Heilman v. Heilman*, 129 Ind., 59; 6 Am. & Eng. Ency. Law [1st ed.], 664, 665. Though there is power of sale, if no imperative duty to sell is imposed, there is no equitable conversion of the land into money. *Harvard v. Peary*, 128 Ill., 430. The will must convey the fee expressly or by strong implication. *Encberg v. Carter*, 98 Mo., 647.

#### BARNES, C.

On the 5th day of October, 1877, John D. Glade, who then resided in Jackson county, Iowa, made his last will and testament, which is as follows:

"I, John D. Glade of Jackson county, Iowa, being of sound mind and memory do make, publish and declare this my last will and testament in manner following:

"1st. I give and bequeath to my beloved wife, Louisa Catherine Glade, one-third of all my money and property, and this bequest is expressly intended to be in lieu of dower and all rights under the law.

"2d. I give and bequeath to my children all the balance of my estate, the same to be divided equally among all my children.

"3d. I direct that the portion of my estate given to my children be invested at interest upon unincumbered real estate security, and that upon my children respectively reaching the age of twenty-four years, each shall receive his or her share thereof, and not sooner. It being my intention to keep at interest and out of the control of my children that portion of my estate going to them till they respectively reach the age of twenty-four years, and upon reaching that age each is to receive his or her respective share and not sooner.

"4th. I further give to my said wife all the interest arising from that portion of my estate given to my children until the same is paid over as directed to them.

"5th. I further direct that my wife be executrix of this



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my last will and that she be exempted from giving the bonds, as such, usually required."

After making said will he moved to Crete, Nebraska, and invested his property in real estate consisting of a farm of 400 acres of land, a certain lot or tract of land in the city of Crete, and a block in Normal, Lancaster county, Nebraska. The farm is situated near the city of Crete, and is a valuable tract of land. His estate remained in this situation until the year 1893, when he departed this life. Shortly after his death this will was duly probated, and the executrix accepted the trust, qualified and entered upon her duties. At the time of the death of the testator four of his seven children to whom, by the terms of the will, he bequeathed two-thirds of his estate, had arrived at the age of twenty-four years. One of the defendants in this case, to wit, Emma L. Ives, and who was one of the heirs under the will, at the time of her father's death, was twenty-seven years old. None of the real property owned by the testator at the time of his death had been sold, up to the time of the commencement of this suit. On the 19th day of October, 1896, the said Emma L. Ives and her husband, J. K. Ives, made, executed and delivered to the plaintiff in this case, their three promissory notes amounting in the aggregate to the sum of \$1,596, the last of which became due on the 19th day of October, 1897; to secure the payment of these notes the defendants, Emma L. Ives and J. K. Ives, executed and delivered to the plaintiff a mortgage in due form of law, by which they conveyed to him whatever right, title or interest the said Emma L. Ives had in the undivided one-seventh of two-thirds of her father's real estate. The mortgage described the real estate and was duly recorded. Default being made in the payment of the notes this action in foreclosure was commenced. J. K. Ives, Emma L. Ives, the American Exchange National Bank, L. H. Denison, Charles Yearger, Henry Griebel and Louisa C. Glade were made defendants. J. K. Ives and Emma L. Ives filed separate answers to the petition. J. K. Ives admitted the execution


and delivery of the notes and mortgage above mentioned, and set forth the fact that the consideration therefor was an indebtedness contracted by wagering or gambling on the board of trade in optional dealings in grain, and was therefore void. Emma L. Ives in her answer as a defense alleged her coverture; that she executed the mortgage and notes under duress and through fear, and by reason of threats made on the part of the plaintiff to prosecute her husband for embezzlement and send him to the penitentiary; that otherwise she would not have signed the same; that she is the daughter of John D. Glade, and whatever right she had to the mortgaged property was acquired through and by his will; that there has never been any partition of the estate; that the will worked an equitable conversion of the estate into money, and that therefore plaintiff took nothing by his mortgage. The defendant, Louisa C. Glade, by her answer, denies the allegations in the petition, and sets up that John D. Glade made a will giving her one-third of all his estate and the balance to his children; that the will was duly probated; that the rest of the defendants had judgments against the estate of Emma L. Ives, and that she is informed by counsel that the estate did not pass to the heirs at once, but remained in her trust till all the heirs reached the age of twenty-four years; that the mortgage given by Emma L. Ives casts a cloud upon the title of the estate and prevents the answering defendant from performing her trust, and effects the salable value of the land; that she has advanced Emma L. Ives money to the extent of her share in the estate, and that she is entitled to be reimbursed before the plaintiff or any of the other defendants are paid; that she has furnished board to Emma L. Ives, her husband and children, at her request, and charged the same to her account; that said money and board so advanced to Emma L. Ives amount to the sum of \$1,822.41 for which she is entitled to be first paid out of the share of said Emma L. Ives in the estate; that the will, by its terms, worked an equitable conversion of the real estate into money, and that the plaintiff by his

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mortgage took no right, title, interest or lien in said real estate. The American Exchange Bank, Griebel and Charles Yearger each answered by cross-petitions, setting up their judgments against the said Emma L. Ives, and each prayed a decree establishing the priority of liens upon the marshalling of assets and the payment of the judgments out of the interest of the said Emma therein. Proper replies were filed to these answers. The cause was tried in the district court for Saline county, the court found for the plaintiff and rendered a decree foreclosing the mortgage. Exceptions were taken to the findings by the defendants, J. K. Ives, Emma L. Ives, Louisa C. Glade, who thereupon brought the case to this court by appeal.

The main questions involved in this appeal are: whether the construction of the will and the law to be applied therein is contended on the part of the appellants that under the terms of the will there was an equitable conversion of the real estate of the testator into money; that by the mortgage executed by Emma L. Ives, his wife, and his husband to the plaintiff created no lien upon her share of the estate. In other words, that the plaintiff is entitled to the property by his mortgage. On the other hand, it is contended that by the terms of the will, neither directly nor by implication, was there any conversion of the estate into money. It is further insisted on the part of the appellees that upon the death of the testator Emma L. Ives was vested with her interest in and title to that portion of the real estate bequeathed to her by her deceased father; that she had full power to sell, convey or incumber the same; and that the mortgage in question is a valid lien upon a portion of the real estate owned by the testator at the time of his death.

1. Where the provisions of a will are of such a character as to amount to a positive direction to convert the real estate into money or personalty, or where by a construction of the will such intention of the testator



clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money, or personalty, took place at the time of his death. 2 Jarman, Wills, 183; *Wurts' Executors v. Page*, 4 C. E. Greene [N. J. Eq.], 365; *Stagg v. Jackson*, 1 N. Y., 206; *Martin v. Sherman*, 2 Sandf. Ch. [N. Y.], 342; *Van Vechten v. Van Veghten*, 8 Paige Ch. [N. Y.], 104.

2. This court, on the question of the construction of wills, has established the rule that the intention of the testator, if it can be ascertained, must govern. In the case of *Weller v. Noffsinger*, 57 Neb., at page 459, the following language is used: "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and a comprehensive view of all of the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." This rule is cited with approval in *Arlington State Bank v. Paulsen*, 57 Neb., 717.

3. We will now, having in view this rule, give our attention to the form of the will and, if possible, determine the intentions of the testator as expressed therein.

By the first clause of this instrument the testator gave and bequeathed one-third of all his money and property to his wife, Louisa C. Glade. On his death and the probate of the will, she took absolute title to one-third of all of his money and property. Her title thereto vested at once. This she accepted in lieu of dower and the provisions made for her by law.

By the second clause of the will it was provided: "I give and bequeath to my children all the balance of my estate, the same to be divided equally among my children." These are words of direct, absolute and present gift, and unless qualified so as to destroy their natural meaning and effect,

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at once, on the death of the testator and the probate of the will, vested the right to two-thirds of the money and property of the estate in the children of the deceased, according to their respective shares.

By the third clause of the will it was directed that the portion of the estate given to the children should be invested at interest upon unincumbered real estate security, and as each one of them respectively should become twenty-four years of age each should receive his or her share, plainly implying that it should be paid over to him or her. This qualifying clause had the effect to postpone the right of the children to the possession of their respective shares of the estate until each of them respectively should become twenty-four years of age. It will be further observed that the will does not in any of its provisions authorize the executrix or any one else in express terms to sell any portion of the real estate; yet such power is surely contained therein by implication. The words "give and bequeath," used in the will, are apt terms used in the disposition of money or personal property only; such terms work no gift or conveyance of any interest in real estate. The word "devise" is not used in the will, and it contains no other word or words of equivalent meaning to indicate that it was the intention of the testator to give or convey to his children any real estate whatever. The provision that the portion of the testator's estate bequeathed to his children was to be invested in unincumbered real estate securities, and at the time designated in the will the share of each of them should be paid over to him or her, makes it impossible to carry out the terms of the will, unless the real estate be converted into money. Personal property, money, can be paid over, but no such term can be applied to the conveyance of real estate. It can not be paid over. That it was the intention of the testator that the estate should be converted into money, and that the respective shares of the children were to be paid to them as such, is thus put beyond question. *Delafield v. Barlow*, 107 N. Y., 535, 14 N. E. Rep., 498; *Cherry*

*v. Greene*, 115 Ill., 591, 4 N. E. Rep., 257; *Dodge v. Williams*, 46 Wis., 70. At the time of the death of the testator at least four of the children, the defendant, Emma L. Ives, included, were more than twenty-four years of age. Therefore, each one of these four heirs became vested, at the testator's death, with the right to demand his or her proportionate share of the estate. The will, by its terms as to them, did not even postpone the present right of possession and enjoyment of their respective shares. If Emma L. Ives, upon the death of her father and the probate of the will, had demanded that her share of the estate should be paid over to her, the executrix would have been obliged to comply with the demand. She could have compelled her mother to sell the real estate for that purpose. Being thus entitled to demand and receive her share of the estate, it must be considered that the money paid or advanced to her was a payment on her share thereof. The sum so advanced amounted to her full interest in the estate. As shown by the evidence herein, this would leave nothing for the satisfaction of the mortgage, even if it were construed as an assignment of her share in the estate.

It seems clear that the will, by a fair construction of its terms, and every implication, worked an equitable conversion of the real estate of the testator into money. *Clarke v. Clarke*, 24 S. E. Rep. [S. Car.], 202; *Farmer v. Spell*, 11 Rich. Eq. [S. Car.], 547, 548; *Perry v. Logan*, 5 Rich. Eq. [S. Car.], 202; *Moore v. Davidson*, 22 S. Car., at page 94; *Jaudon v. Ducker*, 27 S. Car., 295, 3 S. E. Rep., 465; *Penfield v. Tower*, 46 N. W. Rep. [N. Dak.], 413; *Dodge v. Williams*, 46 Wis., 70; *Chandler's Appeal*, 34 Wis., 505; *Dodge v. Pond*, 23 N. Y., 69; *Craig v. Leslie*, 3 Wheat. [U. S.], 563; *Arlington State Bank v. Paulsen*, 57 Neb., 717; 1 Pomeroy, Equity Jurisprudence, p. 413.

The learned judge of the district court was therefore mistaken in his construction of the will, and his view of the law to be applied to its provisions. We therefore hold that under the will in question there was an equitable conversion of the testator's real estate into money at the time of his death.

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4. It follows that the heirs have no interest in the estate, as such; that it can not be seized on attachment by their creditors, nor is a judgment against them enforceable thereon. *Arlington State Bank v. Paulsen, supra.*

We further hold that the defendant, Emma L. Ivers, had no power to sell, convey or mortgage her share of the real estate, as real estate. It follows that the mortgage made by herself and husband to the plaintiff created no lien upon the real estate described therein, or any part thereof. In other words, the plaintiff took no interest in the real estate by his mortgage.

For the foregoing reasons we recommend that the judgment of the district court be reversed and the case be dismissed.

POUND and OLDHAM, CC., concur.

REVERSED AND DISMISSED.

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AUGUSTA BUETTGENBACH, APPELLANT, V. HENRY IVERS  
ET AL., APPELLEES.

FILED MAY 8, 1902. No. 11,486.

Commissioner's opinion. Department No. 2.

1. **Homestead: CONVEYANCE OR INCUMBRANCE: STATUTE.** The provisions for the conveyance or incumbrance of the homestead are exclusive.
2. **Homestead: ABANDONMENT: SUFFICIENCY OF EVIDENCE.** The evidence was examined, and *held* to not show an abandonment of the homestead.
3. **Contract: CONTRAVENING OF STATUTE: ENFORCEMENT IN EQUITY.** A court of equity will not enforce a contract made in contravention of a statute.
4. **Mandatory Injunction: WHEN GRANTED.** A mandatory injunction will not be granted except to prevent a failure of justice, and only when the right is clearly established.

APPEAL from the district court for Lancaster County.  
Tried below before FROST, J. *Reversed.*



*J. C. McNerney*, for appellant.

*Sawyer & Snell*, contra.

OLDHAM, C.

Augusta Buettgenbach began this action in the district court of Lancaster county against Henry Gerbig and Anna Gerbig. In her petition exhibited against them she alleges, in substance, that she is the wife of Henry Buettgenbach and that her husband is the owner of a quarter section of land (describing it) in Lancaster county on which they now reside and have resided for seventeen years last past as their homestead; that in the month of February, 1898, the defendants entered upon said premises, as plaintiff then believed, pursuant to a lease from her husband; that in the month of September, 1899, the defendants claimed to have purchased said premises from her husband and now claim to own the same. She avers that she has never agreed to sell said premises and has not signed or executed any instrument to that effect or purpose. She also avers that since this time the defendant, Henry Gerbig, is in effect committing waste thereon and has used and continues to use cruel and abusive language to her and so conducts himself toward her as to injure her peace of mind, injure her health and prevent her from the enjoyment of her homestead rights thereon, and prays, among other things, that on the final hearing she have a mandatory injunction dispossessing the defendants and restoring to plaintiff her homestead rights in the said premises.

The defendants appeared and filed a cross-petition, set up an oral contract of purchase, and prayed specific performance of the contract. The contract set up is, in substance, as follows: Defendants were to move with their family on said land and live in the house thereon; board the plaintiff and her husband so long as they should live, furnish feed and shelter for one pony and one cow belong-



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ing to them; allow them to occupy three rooms in said house and have the use of a small plot of ground for a flower garden. The defendants to pay the balance due on the land, amounting to \$1,008 with interest when due; pay to each of the Buettgenbachs interest on \$1,000 at the rate of five per cent. per annum as long as they should live, the principal to be paid at their death to their heirs or devisees; that when the defendants paid the balance due on the land the contract of purchase should be assigned to them and they should take the deed for the land. At the time when they should receive the deed they should execute and deliver to plaintiff and her husband a mortgage on said land securing to each the said \$1,000, on which they were to receive the yearly interest as aforesaid. They also alleged that they moved on the land and took possession thereof, and now have possession of the premises under said contract, and have performed all the conditions of the contract to be done and performed by them up to this time, except the payment of the balance due on the land, which they aver they are ready and willing to make. They further allege that said Henry Buettgenbach is willing to carry out the terms of said contract, but the plaintiff has "refused, and still refuses so to do."

It might be well to here state that Henry Buettgenbach does not appear to have been made a party by either plaintiff or defendant, but the record shows that on the day this cross-petition was filed he filed an answer admitting the facts stated therein to be true. To this cross-petition the plaintiff filed a reply, denying the alleged contract of sale, and again alleged that the said premises are her homestead. On these issues the case was tried to the district court for Lancaster county, which resulted in a decree for specific performance in favor of defendants and a dismissal of the plaintiff's petition. From this decree she appeals to this court.

The evidence concerning this alleged contract of sale is somewhat conflicting, but there is no dispute that the plaintiff and her husband had occupied these premises for

many years, and in fact the property was their homestead at the time this contract is claimed to have been made.

Section 4 of chapter 36, Compiled Statutes, is as follows: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

In *Horbach v. Tyrrell*, 48 Neb., 514, this court said, in interpreting the meaning of this statute: "The obvious purpose of this statute is to render all conveyances or incumbrances made of a homestead absolutely void unless such conveyances are not only signed and witnessed but acknowledged by both the husband and wife."

In *France v. Bell*, 51 Neb., 57, this court again has said: "Our statute allows the title of the homestead to be in either the husband or wife (Compiled Statutes, chapter 36, section 2), and it can not be conveyed or incumbered unless the instrument of conveyance be signed by both the husband and wife."

Such has been the uniform holding of this court since the enactment of this statute. *Aultman & Taylor Co. v. Jenkins*, 19 Neb., 209; *Swift v. Dewey*, 20 Neb., 107; *Larson v. Butts*, 22 Neb., 370; *Whitlock v. Gosson*, 35 Neb., 829; *Giles v. Miller*, 36 Neb., 346; *Clarke v. Koenig*, 36 Neb., 572; *Violet v. Rose*, 39 Neb., 660; *Havemeyer v. Dahn*, 48 Neb., 536; *Teske v. Dittberner*, 63 Neb., 607, 88 N. W. Rep., 658.

In *Whitlock v. Gosson*, *supra*, this court held: "The statutory provision for the conveyance or incumbrance of the homestead is exclusive." In this same case Post, J., speaking for the court, said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee. Such is the view sanctioned by the clear

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weight of authority and supported by the soundest reasoning."

From the holdings of this court it would seem that we have firmly established the doctrine in this state that the statutory provisions for the conveyance or incumbrance of the homestead are exclusive. In other words, there is no power by which homesteads can be conveyed or incumbered other than by a substantial compliance with the statute, and this would mean only by an instrument in writing, executed and acknowledged by both husband and wife for that purpose. This, we think, is the plain intent and purpose of the statute. If oral agreements should be recognized and enforced, the provisions of the statute would thereby be annulled. A construction of a statute which results in nothing but annulments of its provisions can not be upheld.

But it is contended by counsel for appellees that the question of homestead rights is eliminated from this case because the Buettgenbachs abandoned their homestead, or, as stated in brief of counsel, "The Buettgenbachs waived their homestead rights in this land when they surrendered possession of the same to the Gerbiges under the verbal contract of sale." In support of this contention we are cited to three Iowa cases which seem to support this view, the leading one being *Drake v. Painter*, 77 Ia., 731, but we can not agree that its logic is applicable. In this case there was an oral contract coupled with possession which the court upheld; but for us to do so in the case at bar would be to nullify the provisions of the statute and to allow and sanction that which is prohibited by law to be accomplished by indirect means. It is true that there can not be two separate homesteads in the same tract of land; but in order to assert the homestead right, possession or the right of possession is not enough. Something must be owned by some sort of title to which the right will attach. As there was no power existing in the Buettgenbachs by reason of the statutory prohibition to make this oral contract, they lost none of their ownership by it and

the Gerbigs obtained none under it. No homestead right could begin in the Gerbigs until this right was extinguished in the Buettgenbachs, and this could only be extinguished by such a conveyance as would divest them of ownership, as it is an undisputed fact that they continued to reside on this land and make it their home, as they had done for a number of years before.

By our law the homestead vests in the husband and wife jointly and is a life estate. Upon the death of either this life estate vests in the survivor. Neither has the right to dispose of it in any manner except with the consent of the other, and then only in the manner prescribed by the statute. The right of the wife therein can only be lost by her voluntary alienation, by her voluntary abandonment, or by her death. *Collins v. Boyett*, 87 Tenn., 334; *Smith v. Pearce*, 85 Ala., 264. A court of equity will not enforce a contract which is in contravention of the statute.

There are other reasons urged why this decree should not be upheld, but as the one which we have considered effectually disposes of the appellees' right of action on their cross-petition these others will not be considered. The question remaining is, what relief is the appellant entitled to in this action? She prays for a mandatory injunction for the purpose of dispossessing the appellees of the premises. This writ will issue only to prevent a failure of justice. By her petition she does not show facts indicating that there would be a necessary failure of justice unless this extraordinary writ issue.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings in conformity with this opinion.

BARNES and POUND, CC., concur.

REVERSED AND REMANDED.

Kear v. Eastern Building &amp; Loan Ass'n.

JOHN C. KEAR ET AL., APPELLEES, v. THE E.  
ING & LOAN ASSOCIATION OF SYRACUSE  
APPELLANT.

FILED MAY 8, 1902. No. 11,525.

Commissioner's opinion. Department No

**Building and Loan Associations: SURRENDER OF STOCK  
MENT OF DUES: EFFECT.** When a member of a  
loan association, not incorporated under the law  
borrows money of the society at an agreed rate  
surrenders to the society his shares of stock therefor  
to continue the payment of monthly dues upon a  
stipulation is without consideration and his vol-  
unteer's obligations to the association are discha-  
ged. Payment of the loan with interest at the agreed rate.

APPEAL from the district court for Lancaster.  
Tried below before HOLMES, J. *Affirmed.*

*Abbott, Selleck & Lane, for appellant.*

The provisions made in the certificates for the purchase of stock, in a building and loan association, for a definite period, and the taking of a limited number of shares mentioned in the mortgage, constitute an encumbrance of the time in which the payments and earnings equal the face value of the stock, and is not binding on the association or members thereof, except when the payments and earnings equal such value. *O'Malley v. Building, Loan & Savings Association*, 92 N. Y., 572; *Heslin v. Eastern Building & Loan Association of Syracuse*, 59 N. Y. Supp., 572; *Daley v. People's Building, Loan and Savings Association*, 52 N. E. R. 1090; *Bertche v. Equitable Loan & Investment of Sedalia*, 48 S. W. Rep. [Mo.], 954; *King v. Industrial Building, Loan & Investment Union*, 48 N. E. 677; *Bearden v. People's Loan & Savings Association*, 22 S. W. Rep. [Tenn.], 64; *People v. Lowe*, 22 [N. Y.], 1016; *Lane v. Southern Building & Loan Association*, 54 S. W. Rep. [Tenn.], 329; *Leahy v. National*

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*ing & Loan Association*, 76 N. W. Rep. [Wis.], 625; *People's Building, Loan & Savings Association v. Morris*, 56 S. W. Rep. [Ark.], 266; *Schell v. Equitable Loan & Investment Association of Sedalia*, 51 S. W. Rep. [Mo.], 406; *Fisher v. Patton*, 33 S. W. Rep. [Mo.], 451, 34 S. W. Rep., 1096.

Borrowers are not entitled as an absolute right to have their dues and earnings applied on the loan. *Hale v. Cairns*, 77 N. W. Rep. [N. D.], 1010; *Russell v. Pierce*, 80 N. W. Rep. [Mich.], 118; *Phelps v. American Savings & Loan Association*, 80 N. W. Rep. [Mich.], 120; *Sweeney v. El Paso Building & Loan Association*, 26 S. W. Rep. [Tex.], 290; *Randall v. National Building, Loan & Protective Union*, 42 Neb., 809, 43 Neb., 876.

All agreements to pay or apply dividends are against public policy and will not be enforced unless it is shown that the dividends have in fact accrued. *Taft v. Hartford, P. & F. R. Co.*, 8 R. I., 310; *Boone, Corporations*, section 125; *Lockhart v. Van Alstyne*, 31 Mich., 76; *Cook, Corporations*, sections 271, 546, 547; *Endlich, Building Associations*, sections 323, 324.

*S. L. Geisthardt, contra.*

A transaction of the character of the one involved in this case constitutes simply a loan. *Livingston Loan & Building Association v. Drummond*, 49 Neb., 200, 68 N. W. Rep., 375. Payments made under such a contract, though claimed to be payments on stock, must be treated as payments on the loan itself. *Randall v. National Building, Loan & Protective Union*, 42 Neb., 809, 60 N. W. Rep., 1019, 43 Neb., 876, 62 N. W. Rep., 252. The weight of reason and authority is to the effect that when a borrower has complied with his part of the contract he is entitled to a release of his mortgage. *Pioneer Savings & Loan Co. v. Pancoast*, 43 S. W. Rep. [Tex.], 280; *Interstate Savings & Loan Association v. Cairns*, 47 Pac. Rep. [Wash.], 509; *Williamson v. Eastern Building & Loan Association*, 32 S. E. Rep. [S. Car.], 765. The corporation is not entitled to keep the mortgage alive to secure future

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payments on the stock after the mortgage debt itself has been paid. *Manorita v. Fidelity Trust & Loan Co.*, 101 Fed. Rep., 8; *Fidelity Savings Association v. Shea*, 55 Pac. Rep. [Idaho], 1022; *Welling v. Eastern Building & Loan Association*, 34 S. E. Rep. [S. Car.], 409; *Eastern Building & Loan Association v. Olmsted*, 16 App. D. C., 387.

### AMES, C.

The appellant is a so-called mutual building and loan association incorporated under the laws of the state of New York. Too much space would be occupied in an attempt to set out in detail in this opinion the frame-work of the company and its methods of conducting business, as disclosed by its articles of incorporation. With the general character of such institutions both the public and the profession are so far familiar that an account of what occurred in the following described transaction will suffice for an understanding of the case. The so-called stock of the company is divided into shares of the nominal amount of \$100 each. The association had, however, at the beginning no capital at all, but depended for its income and accumulations upon premiums, dues and interest charges to be collected from its members and from persons having dealings with it. Shortly before the 8th day of March, 1892, the appellee, John C. Kear, for the purpose of procuring a loan from the company, became the nominal owner of six shares of its capital stock. At or about the date last mentioned he assigned these shares to the institution and ceased to have any right, title or interest in or to them or on account of them or to accumulations thereafter to accrue to the company. In consideration of the assignment, the association loaned, or, as it was termed, advanced to him the sum of \$600, less a so-called premium of ten per cent. of the amount, or in reality \$540, and in further consideration of the loan he executed to the association sixty-nine promissory notes, payable at intervals of one month, sixty-six of them being for \$9.50 each, and the remaining three for \$5 each, thus assuring the payment

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of the aggregate amount of \$642 in sixty-nine monthly installments. As further assurance of payment, Kear and his wife, the other appellee, executed their mortgage upon certain lands lying in Lancaster county. All these notes were promptly paid as they became due. The average length of time for which the money was retained by Kear was thirty-four and one-half months, at the expiration of which time he had repaid the principal and paid \$102, or \$2.96 per month, additional, being at the rate of a little more than six and fifty-five hundredths per cent. per annum. If he had borrowed \$540 at ten per cent. per annum, payable in monthly installments, each payment would have been \$4.50, making a total interest charge of \$155.25, which added to the principal would have made an aggregate of \$695.25 requisite to satisfy his obligation. This sum is only \$53.25 greater than the amount he has in fact paid and is the largest rate of interest allowed by our statute, except to associations incorporated under the laws of this state. Having made these payments Kear demanded a release of his mortgage, and, being refused, begun this action to procure a judicial cancellation of it and to recover damages for the refusal. The district court granted the cancellation and awarded him \$100 in damages and the association appealed to this court. It is not denied that at the time the loan was made the officers of the society, who transacted the business on its behalf, represented to the plaintiff that all claims against him and his property would be satisfied by payment of the notes, but the mortgage refers to the organization papers of the defendant and purports to make them a part of the instrument, and by these papers it is provided that seventy-five cents per share per month, or \$4.50 per month in all, of the moneys paid on the notes shall be accredited to payment of dues and that the monthly payment of that amount in dues shall continue indefinitely until there shall be accumulated \$100 for each share of the company. For this reason it is contended that \$217.50 still remains due and unpaid to the defendant under the entire contract



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and is charged by the mortgage as a lien upon the lands. In our opinion, this agreement to pay dues after the plaintiff had parted with his shares to the association and had ceased to be entitled to participate in its accumulations was without consideration and is void. If we accede to the defendant's demand in its entirety, which we must do or reject it all, and add the \$217.50 to the sums already paid, the total amount of interest he will have paid for his loan of \$540 will be \$319.50, or at the rate of twenty and one-half per cent. per annum. Such contracts are extortionate and unconscionable and, in our opinion, the right to make and profit by them ought to be confined to corporations organized under the laws of this state, where the industrious and deserving poor may be sure of enjoying at least the sympathies of those in more fortunate circumstances. See *Randall v. National Building, Loan & Protective Union*, 42 Neb., 809, 43 Neb., 877.

We recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

AFFIRMED.

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JOSHUA PALMER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORNELIUS VAN AUKEN, DECEASED, APPELLEE,  
v. WILLIAM MIZNER, APPELLANT, ET AL.

FILED MAY 8, 1902. No. 11,553.

Commissioner's opinion. Department No. 3.

1. **Quieting Title: ACTION TO CANCEL DEED: LIMITATION OF ACTIONS.**

The statute of limitations does not begin to run against an action to cancel a deed, constituting a cloud on the title to real estate, until some right or title is asserted under such deed, and such fact is brought to the knowledge of the holder of the title.

2. **Quieting Title: RECORDING UNDELIVERED DEED: NOTICE.** The mere record of an instrument, signed and acknowledged by the owner of real estate, but not delivered, which is taken from his possession and filed for record, without his knowledge or consent, by the grantee named therein, is not notice to such owner that such grantee asserts some right or title under the deed.

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3. **Quieting Title: UNDELIVERED DEED: FAILURE TO WATCH FOR RECORD OF: LACHES.** Laches will not be imputed to one from a mere failure to watch the records to guard against the recording of a forged or undelivered deed purporting to be a conveyance of his real estate.
4. **Quieting Title: RECORDING UNDELIVERED DEED: LEASE FROM GRANTEE TO GRANTOR: RECORDING AFTER DEATH OF GRANTEE: EFFECT ON DEED.** The owner of real estate signed and acknowledged a deed of conveyance thereof, and at the same time took back a lease, executed by the grantee, for a life estate in the same premises; he retained possession of both instruments; his grantee obtained possession of the deed and filed it for record, without his knowledge or consent. After the death of the grantee, the grantor, on learning that the deed had been taken from his possession and recorded, filed the lease for record. The deed purports to have been given for a valuable consideration. *Held*, That his conduct rendered the deed as effective as though formally delivered.

APPEAL from the district court for Saline county. Tried below before HASTINGS, J. *Reversed*.

*A. S. Sands and E. M. Palmer*, for appellant.

*F. I. Foss, B. V. Kohout and R. D. Brown*, contra.

ALBERT, C.

It sufficiently appears from the evidence in this case that in 1892 the plaintiff signed and acknowledged a deed of conveyance of certain real estate, in which Jennie Van Auken, his daughter, was named as grantee. The grantee, at the same time, executed and delivered to the plaintiff a lease of the same premises for the term of his natural life. The deed was not delivered to the grantee. It was understood at the time that the deed should become effective only in the event of the death of the plaintiff who was ill at the time. The lease was executed to protect the plaintiff against the contingency of the unauthorized possession of the deed by the grantee. Afterward, in the same year, the grantee got possession of the deed, without the knowledge or consent of the plaintiff, and filed it for record. The grantee died intestate in 1896, leaving the defendant, Mizner, as her sole heir. Afterward, in 1898,

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the plaintiff filed the lease for record. . The grantee was never in possession under her deed, and, save such inferences as may be drawn from the act of filing such deed for record, never asserted any right or title to the premises by virtue of it. After her death, her administrator, as such, asserted some rights under the deed and the plaintiff brought this action to cancel it and to remove the cloud cast thereby on his title to the premises, making such administrator and the heir of the grantee defendants. From a decree in favor of the plaintiff the defendants prosecute this appeal.

It is first insisted that the suit is barred by the statute of limitations, because it was not brought within four years from the date of the recording of the deed, and there was no evidence offered tending to show that the recording of the deed had not been discovered by the plaintiff until within four years next preceding the commencement of the action. An action of this character does not accrue until the grantee asserts some right under the deed. *Eayrs v. Nason*, 54 Neb., at page 153; *Pleasants v. Blodgett*, 39 Neb., 741. If we understand the argument, the act of recording the deed was an assertion of some right under it, and that such act was notice to the world of that fact. Whether such act was an assertion of some right under the deed we need not determine, because there is no evidence that it was known to the plaintiff more than four years before the commencement of this action. The statute would not begin to run on the assertion of some right under the deed made to third parties and not brought home to the plaintiff. As to the record of the instrument being notice to the plaintiff, to hold that it was would be a gross perversion of our registry laws. They were never designed to charge the owner with notice of unlawful attempts to deprive him of his property. . Conceding that an action of this character is barred in four years, a point we do not decide, the statute had not run in this case. The same principle runs through the doctrine of laches invoked by the defendants. A lack of vigilance is

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not to be imputed to one simply because he fails to keep watch of the records to guard against the chance of the recording of a forged or stolen deed. He has a right to rely on the knowledge of a valid title in himself, and that such title may be divested only by lawful means.

But assuming, as we have, that the grantee abstracted the deed from the private papers of the plaintiff and had it recorded without his knowledge or consent, if, upon learning of such facts, the plaintiff assented thereto and acquiesced therein, such assent and acquiescence would be as effectual as a formal and actual delivery of the deed. As before stated, after the death of the grantee the plaintiff filed his lease for record. No explanation of such act was offered. It may have been in pursuance of some agreement or understanding had between him and the grantee, named in the deed, in his lifetime; it may have been to avoid a claim for services rendered by her in her lifetime, which is a part of the consideration named in the deed. Aside from its evidential value on the question of how the deed was obtained by the grantee, it seems clear to us that the acceptance of the lease and the filing of it for record amount to a ratification of the alleged unauthorized taking and recording of the deed. If that be true, the deed thereby became as effectual as though actually delivered by the grantor.

It is recommended that the decree of the district court be reversed, and the cause remanded for further proceedings according to law.

AMES and DUFFIE, CC., concur.

REVERSED AND REMANDED.

Opinion on rehearing follows.

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**JOSHUA PALMER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORNELIUS VAN AUKEN, DECEASED, APPELLEE, v. WILLIAM MIZNER, APPELLANT, ET AL.**

FILED MARCH 18, 1903. No. 11,553.

Commissioner's opinion. Department No. 2.

1. **Exceptions, Bill of: NOT PROPERLY AUTHENTICATED: EVIDENCE, ON APPEAL AND ERROR.** Where a bill of exceptions purporting to contain the evidence in a case is not authenticated by the clerk of the district court, it is not properly before the supreme court and will not be examined; and questions presented on error, or appeal, depending upon matters of evidence, can not be decided.
2. **Exceptions, Bill of: NOT PROPERLY AUTHENTICATED: JUDGMENT CONFORMS TO PLEADINGS: APPEAL AND ERROR.** In such a case, if the judgment or decree of the trial court conforms to and is supported by the pleadings, it will be affirmed.

REHEARING of case reported *ante*, page 899.

APPEAL from the district court for Saline county. Tried below before HASTINGS, J. *Former opinion vacated and judgment below affirmed.*

*A. S. Sands and E. M. Palmer*, for appellant.

*F. I. Foss, B. V. Kohout and R. D. Brown*, contra.

BARNES, C.

This case is before us on a rehearing. Our former opinion, wherein the judgment of the district court was reversed, was written by Mr. Commissioner ALBERT, and is reported *ante*, page 899, and in 90 N. W. Rep., 637.

The principal, and only, contention of the appellant is that the judgment or decree of the trial court is not sustained by the evidence, and is contrary to law. This requires us to examine the bill of exceptions and the evidence contained therein and determine the probative force thereof. We find, however, that there is no certificate of the clerk of the district court attached to the

purported bill of exceptions in this case, and the same is in no manner authenticated. Under the well established law of this state and the rules of this court, such purported bill of exceptions can not be considered by us for any purpose.

"Where the bill of exceptions purporting to contain the evidence in a case is not authenticated by the certificate of the clerk of the trial court, it is not properly before this court, and will not be examined, and assignments of error depending upon matters of evidence can not be decided." *First National Bank of Greenwood v. Cass County*, 47 Neb., 172, 66 N. W. Rep., 300.

In *Martin v. Fillmore County*, 44 Neb., 719, 62 N. W. Rep., 863, it was held: "In order to authenticate a document attached to a record, as the bill of exceptions settled in the district court, there must be a certificate of the clerk of the court to that effect."

A bill of exceptions must be certified by the clerk of the trial court as being the original bill of exceptions in the cause, or a copy thereof, in order that the matters therein may be considered by the supreme court. *Wax v. State*, 43 Neb., 18, 61 N. W. Rep., 117. The same rule was announced in *Felber v. Gooding*, 47 Neb., 38, 66 N. W. Rep., 39; *Childerson v. Childerson*, 47 Neb., 162, 66 N. W. Rep., 281; *Romberg v. Fokken*, 47 Neb., 198, 66 N. W. Rep., 282; *Union P. R. Co. v. Kinney*, 47 Neb., at page 396, 66 N. W. Rep., 449; *Sieberling v. Fletcher*, 47 Neb., 847, 66 N. W. Rep., 839; *Harris v. Barton*, 53 Neb., 568, 74 N. W. Rep., 49; *Forbes v. Morearty*, 54 Neb., at page 506, 74 N. W. Rep., 822. In fact there is an unbroken line of authorities which holds, without a single exception, that matters contained in a purported bill of exceptions can not be considered for any purpose unless the bill is authenticated by the certificate of the clerk of the district court where the cause was tried. The condition of the record herein, although suggested on the former hearing, seems to have been overlooked by the writer of the opinion, and because of that fact the rehearing was recommended

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by him. The so-called bill of exceptions should not have been, and can not now be, considered for any purpose. This brings us to the inquiry as to whether or not the decree of the trial court conforms to and is supported by the pleadings. *Crawford v. Smith*, 57 Neb., 503, 77 N. W. Rep., 1078.

An examination of the transcript shows us that the facts alleged in the petition, if proved, are sufficient to sustain the decree of the trial court, and we therefore recommend that our former opinion be vacated and set aside, and that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

The judgment heretofore entered in this case by this court is hereby vacated; and it is further ordered that the judgment of the district court be, and the same is hereby affirmed.

JUDGMENT BELOW AFFIRMED.

NOTE.—November 5, 1903, an opinion was written by SEDGWICK, J., in the above cause, denying a rehearing on the decision that the document purporting to be a bill of exceptions, could not be considered because it was not sufficiently identified by the certificate of the clerk of the district court. This opinion is reported in — Neb., —, 97 N. W. Rep., 334.—REPORTER.





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5. **Assessments, Validity of: BRIEFS: GENERAL STATEMENTS IN.** Where several special assessments were found to be invalid in the lower court and the validity of such assessments depends upon statutes now repealed so that to pass upon them will require a minute investigation of documentary evidence and laborious search for the several statutes applicable thereto, assertions in appellant's brief that such assessments are valid and are shown by the proof to be valid, without stating any reasons for such opinion, or affording any material assistance to this court toward verifying it, do not require review of such findings. *Farmers Loan & Trust Co. v. Hastings* ..... 337
6. **Assignments: CONSIDERATION.** In proceedings in error only such grounds as are assigned in the petition in error will be considered. *Kennard v. Grossman* ..... 743
7. ———: **JUDGMENT, JOINT: STATUTES.** A judgment entered in accordance with section 511 of the Code is none the less a joint judgment. Hence an assignment of error that the "court erred in rendering a joint judgment against the defendants" does not raise the question whether the requirements of said section should have been complied with. *Campbell v. Laue* ..... 63
8. ———: **OVERRULING MOTION FOR NEW TRIAL.** A judgment will not be reversed for errors of law occurring at the trial, unless it is alleged in the petition in error, and shown by the record, that the court erred in overruling the motion for a new trial. *Gregory v. Leavitt*..... 637
9. ———: **WITHOUT RULINGS OR EXCEPTIONS.** This court can not consider or pass upon assignments of error when the record fails to show any rulings on, or exceptions to, the matters complained of in the court below. *Wells v. Fetzer*, 551
10. **Bankruptcy Pending Appeal: PARTIES.** *Matson v. Emerson*, 190
11. **Briefs: ASSIGNMENTS NOT IN: WAIVER.** Assignments of error not argued or relied on in briefs of counsel will be deemed waived. *Brown v. Houghton*..... 425

12. ———: ERRORS NOT URGED IN. Errors not urged in the briefs will be disregarded. *Brown v. Collins*..... 149
13. ———: QUESTIONS NOT PROPERLY RAISED IN. This court is not bound to examine questions not so raised in the briefs as to state fairly what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto. *Livingston v. Moore*..... 498
14. ———: QUESTIONS NOT RAISED BY. On appeal this court is not bound to pass upon questions not fairly raised in the briefs of counsel for appellant. *Farmers Loan & Trust Co. v. Hastings* ..... 337
15. Confirmation of Sale: SUFFICIENCY OF RECORD. Record examined, and held to disclose no error on the part of the court on confirmation of a sale. *Phoenix Ins. Co. v. Howe*.. 20
16. Costs: FINAL ORDER. To entitle a party to a review there must have been a final order or judgment rendered in the cause. *Reynolds v. City of Tecumseh*, 48 Neb., 785. *McLucas v. St. Joseph & G. I. R. Co*..... 154
17. ———: JUDGMENT FOR: FINAL ORDER. A mere judgment for costs is not a final judgment and proceedings in error will not lie to reverse such judgment. *Solack v. Ganson*..... 276
18. Discretion: EXCEPTION. An alleged abuse of discretion on the part of the trial court is unavailing unless excepted to. *Guthrie v. State* ..... 28
19. Equity and Conscience Absent from Bill. Where a bill discloses nothing of equity and still less of conscience a judgment of the lower court dismissing such bill will be affirmed. *Phoenix Ins. Co. v. Boehl*..... 272
20. Equity Cause on Error: MOTION FOR NEW TRIAL. In order to review the proceedings in the trial of an equity cause by petition in error a motion for a new trial must be filed in the district court the same as in an action at law. *Gaughran v. Crosby*, 33 Neb., 33, followed. *Miles v. Deming*, 626
21. Error Must Be Shown Affirmatively. A plaintiff in error must show affirmatively that error was committed and that he was entitled as a matter of law to a different judgment or order from that complained of. *Shelby v. Creighton*.... 264
22. Estoppel to Complain. A party will not be heard to complain of the action of the trial court, when the action complained of was at his instance. *Storm v. Holmes*..... 16
23. Evidence: COMPETENCY AND SUFFICIENCY. This court may, however, on appeal pass upon the competency of evidence admitted, in determining whether the decree is supported by sufficient evidence. *Cheston v. Wilson*..... 674

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24. ———: CONFLICTING. The judgment of a district court will not be disturbed where the evidence was conflicting, if the record discloses sufficient competent evidence to support such judgment. *Peterson v. Estate of Peterson*..... 86
25. ———: ———. Findings based on conflicting evidence will not be disturbed. *Holt v. Rust-Owen Lumber Co.*..... 170
26. ———: ———. *Connecticut Trust & Safe Deposit Co. v. Southwick* ..... 291
27. ———: ———. Conclusions of fact drawn by a jury from conflicting evidence will not be disturbed. *Deering & Co. v. Walter* ..... 364
28. ———: ———. The judgment of a district court founded upon conflicting evidence will not be disturbed. *Van Meter v. Province* ..... 413
29. ———: ———. Where the evidence is conflicting, but sufficient competent evidence is in the record to support the finding, the judgment will not be set aside by a reviewing court. *Bourne v. O'Conner*..... 432
30. ———: ———. Where there is a conflict of evidence on the matters in dispute between the parties, the verdict of a jury based thereon will not be disturbed. *Reed v. Mott*.... 450
31. ———: ———. A finding based on conflicting evidence will not be disturbed unless manifestly wrong. *Davies v. Barger* ..... 510
32. ———: ———. The verdict of a jury on testimony fairly conflicting will not be disturbed by this court. *Bonawitz v. De Kalb* ..... 534
33. ———: ———. Where the evidence is conflicting, but there is sufficient evidence to support the verdict, it will not be disturbed. *Schaff v. Hamilton*..... 577
34. ———: ———. Where there is some competent evidence tending to establish all of the facts constituting plaintiff's cause of action, and the evidence on the whole case is conflicting, the verdict of a jury based thereon will not be set aside on the ground that it is not sustained by the evidence. *Rath v. Rath* ..... 600
35. ———: ———. It is a settled rule of this court that the findings of the trial court, on conflicting evidence, will not be reversed on appeal unless clearly wrong. *Continental Nat. Bank of Chicago v. Levy*..... 694
36. ———: ———. Findings of fact by a trial court from conflicting evidence will not be disturbed upon error or appeal, unless clearly wrong. *Dufrene v. Anderson*..... 813
37. ———: ———: ON APPEAL. When the evidence is fairly

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- conflicting, or where the case, as made by the evidence, is such that reasonable minds might fairly differ as to the correct and proper conclusion to be drawn therefrom, a finding of fact made by the trial court will not be disturbed on appeal. *Booth v. Kessler*, 62 Neb., 704, 87 N. W. Rep., 532, followed. *Sullivan Savings Institution v. Sharp*..... 300
38. ———: REVIEW OF RULINGS. The rulings of the trial court on the admission of evidence examined, and *held* that there was no error therein. *Northwall Co. v. McCormick Harvester Machine Co.* ..... 699
39. ———: RULINGS: REVIEW. Rulings of a trial court in the admission of evidence, are reviewable only by petition in error. *Oheston v. Wilson* ..... 674
40. Examination of Witness: OBJECTIONS: OFFER OF PROOF. The ruling of the trial court sustaining an objection to a question propounded to a witness will not be reviewed in the absence of an offer showing what the party complaining of such ruling expected to prove by the witness. *City of Crete v. Hendricks* ..... 847
41. Exceptions. Alleged errors in the introduction of evidence are not reviewable unless excepted to in the trial court. *Pope v. Kingman & Co.*..... 184
42. Exceptions, Bill of: IMPROPER AUTHENTICATION. Where the bill of exceptions is not authenticated by a proper certificate of the clerk, this court can go no further than to see that the judgment appealed from is supported by the pleadings in the case. *Porter v. Detrick*..... 29
43. ———: INSTRUCTIONS. When a case is brought to this court by petition in error and there is no bill of exceptions in the record, instructions given by the trial court that might have been proper under any possible condition of the evidence under the pleadings will not be held erroneous and prejudicial. *Connor v. Schreiner-Flack Grain Co.*..... 188
44. Exceptions Not Properly Taken to Instructions: CORRECTING RECORD. In case exceptions are so filed which were not properly taken at the time the instructions were given, they have no place in the record, and the remedy is to correct the record in the district court by striking them therefrom, the same as where exceptions not seasonably taken are noted by counsel upon the written charge. *City of Lincoln v. Sager* ..... 598
45. Exclusion of Immaterial Matters. Error can not be predicated on the action of the trial court in excluding immaterial matters from the consideration of the jury. *Brown v. Silver* ..... 164

**APPEAL AND ERROR—Continued.**

46. **Final Order.** In the absence of a final judgment, or final order, in an action tried to a jury, proceedings of the trial court will not be reviewed. *Creamery Package Mfg. Co. v. Magill* ..... 414
47. ———. To entitle a party to a review there must have been a final order rendered in the cause. *Reynolds v. City of Tecumseh*, 48 Neb., 785. *Bock v. Grooms*..... 802
48. **Findings: APPROVED.** Findings of fact of the trial court examined and approved. *Union Stock Yards Nat. Bank v. Haskell* ..... 839
49. ———: **EXCEPTIONS: MOTION FOR NEW TRIAL.** The submission of special findings to the jury upon matters claimed to be irrelevant and immaterial will not be reviewed unless excepted to at the time and assigned as error in the motion for a new trial. *Livingston v. Moore*..... 498
50. ———: **PLEADING AND EVIDENCE: PRESUMPTIONS.** Where a cause is tried to the court and there is a general finding for the plaintiff, if any cause of action is stated and there is evidence thereon sufficient to sustain the finding, it will be presumed that the court proceeded thereon and the judgment will be affirmed, although the petition attempts also to state a cause of action of a different nature which would not sustain a recovery. *Omaha Brewing Ass'n v. Tillenburg*, 277
51. ———: **PRESUMED TRUE.** Where the evidence is not preserved and a transcript of the pleadings is not presented, it will be conclusively presumed in the appellate court that the findings of fact of the trial court are true. *Shelby v. Creighton* ..... 267
52. **Foreclosure: SETTING ASIDE: DISCRETION.** No abuse of discretion of the trial court, in refusing to set the sale aside, is shown or complained of. *Pearson v. Badger Lumber Co.*.... 251
53. **Injunction.** *State v. German Savings Bank of Omaha*..... 717
54. **Instructions.** Instructions given examined, and held correctly to state the issues involved in the case. *Boyd v. George* ..... 420
55. ———. Instructions examined, and held pertinent to the issues involved in the case. *Bonawitz v. DeKalb*..... 534
56. ———. An instruction identical in substance with one asked by the complaining party furnishes no grounds of error. *Buck v. Hogeboom* ..... 853
57. ———: **ARGUMENTATIVE: PREJUDICE.** Instruction examined and disapproved; but it appearing from the record that the giving of the instruction in no manner affected the verdict of the jury, held error without prejudice. *Rath v. Rath*.... 600

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58. ———: COMPLAINT EN MASSE. Complaint *en masse* of refusal of five instructions not considered where it is apparent that at least two of them were properly refused. *Buck v. Hogeboom* ..... 853
59. ———: EVIDENCE: PREPONDERANCE AND WEIGHT. Not error to couple with instruction as to preponderance of evidence a correct statement of proper tests as to its weight. *Idem*.
60. ———: EXCEPTIONS. Instructions can not be reviewed in this court unless the record shows they were passed upon by the trial court and an exception taken to the rulings thereon. *German Ins. Co. v. Stiner*..... 308
61. ———: ———. Instructions will not be reviewed unless excepted to in the trial court. *Livingston v. Moore*..... 498
62. ———: ———: TRANSCRIPT: PRESUMPTION. Where exceptions to instructions appear in the transcript immediately after the charge and before the record of submission to the jury and of the verdict, with an entry showing them to have been filed at the same time with the instructions, and are certified to by the clerk as part of the record of the district court, the same presumption arises as in case of notation by counsel upon the instructions themselves. *City of Lincoln v. Sager* ..... 598
63. ———: GIVEN BY COURT REFUSED TO PARTY. It is not error to refuse to give an instruction tendered, when the ground covered thereby is covered by instructions given by the court on its own motion. *Kennard v. Grossman*..... 743
64. ———: IMMATERIAL WHERE NO DAMAGE CAUSED. Where the jury has specially found there was no damage caused, it is immaterial whether instructions as to a justification of the alleged injury are supported by the pleadings. *Axthelm v. Chicago, R. I. & P. R. Co.*..... 444
65. ———: LEGAL CONSEQUENCES OF CERTAIN FACTS. An instruction which merely points out the legal consequence of certain facts, of which there is evidence, in case the jury find them to be established, is not erroneous. *Schnuck v. Hill* ..... 79
66. ———: MATTERS OUTSIDE ISSUES: ESTOPPEL TO COMPLAIN. That a court has given an instruction covering matters outside the issues made, is not a cause of complaint by a party who has himself requested an instruction substantially the same as that of which complaint is made. *Union P. R. Co. v. Lotway*..... 348
67. ———: OBJECTIONS TO, AS A GROUP. Objections to instructions as a group can not be sustained where any of them are properly given. *Axthelm v. Chicago, R. I. & P. R. Co.*.. 444

**APPEAL AND ERROR—Continued.**

68. ———: **PREJUDICE.** Giving and refusing of instructions in the case *held* to show no prejudicial error. *Carlson & Hanson v. Holm* ..... 38
69. ———: ———. A party can not be heard to complain of error in an instruction from which he suffered no prejudice. *Deering & Co. v. Walter*..... 364
70. ———: **REFUSED TO PARTY BUT GIVEN BY COURT.** Where a party to a suit requests the submission of a question to the jury by the tender of an instruction which is refused, he can not complain of an instruction, given by the court on its own motion, submitting the same question. *Kennard v. Grossman* ..... 743
71. ———: **REFUSED WHEN POINT COVERED BY COURT.** Error can not be predicated on the failure of the court to give instructions asked for at the trial where the court in its own instruction has amply covered the grounds contained in the requests. *Rath v. Rath* ..... 600
72. ———: **UNDERSCORING WORDS: PREJUDICE.** Underscoring in an instruction the words *bona fide*, not prejudicial to a party alleging fraud. *Crockett v. Miller*..... 292
73. **Issues in Appellate Court.** It is a well defined rule of this court that under all ordinary circumstances parties will be restricted in the appellate court to the same issues on which they relied in the court of original jurisdiction. *Carnahan v. Brewster* ..... 366
74. ———: **REPLEVIN: CONVERSION.** A plaintiff in replevin on appeal from justice's court to the district court added an allegation of conversion of the property in connection with a claim for value of its use in his petition. *Held*, That this was not necessarily an attempt to state a different cause of action and was not open to a motion to strike out on that ground. *Livingston v. Moore* ..... 498
75. **Judgment Sustained by Evidence and Findings: ERRONEOUS CONCLUSION OF LAW.** Where the evidence sustains the findings, and the findings sustain a formal judgment rendered thereon, such judgment will not be reversed because of an erroneous conclusion of law deducted from the findings of fact, such conclusion being merely an expression of opinion by the trial court. *Rosso v. Milwaukee Harvester Co.* ..... 212
76. **Judicial Sales: CONFIRMATION: OBJECTIONS: INSUFFICIENT.** Objections urged against a confirmation of a sale examined, and *held* insufficient. *Kingsley v. Svoboda*..... 234
77. ———: ———: **PREJUDICE.** An order confirming a sale will not be reversed for technical irregularities which could not



**APPEAL AND ERROR—Continued.**

- have been prejudicial to substantial rights of any of the parties. *Gray v. Eurich*..... 194
78. ———: ———: ———. An order confirming a sale will not be reversed for technical irregularities which could not have been prejudicial to substantial rights of any of the parties. *Gray v. Eurich*, ante, page 194, followed. *Gray v. Naiman* ..... 196
79. ———: ———: ———. A sale will not be set aside for irregularities or errors not prejudicial to the party complaining. *Clark v. Wolf* ..... 290
80. **Jurisdiction: ASSIGNMENTS NOT IN MOTION FOR NEW TRIAL.** An error not going to the jurisdiction of the trial court, and not called to its attention in any way, by motion for new trial or otherwise, will not be regarded in this court. *Jenkins v. Myatt* ..... 592
81. ———: **BY CONSENT.** This court can not acquire jurisdiction to review such a judgment on appeal by consent of the parties. *Boales v. Ferguson* ..... 172
82. **Law Action on Appeal.** The proceedings of a district court in an action at law can not be reviewed in this court on appeal. *Van Doren v. Empkie-Shugart Co.*..... 818
83. **Law of the Case: DEFINITION AND APPLICATION.** "The law of the case" is a rule of expediency which should not be lightly disregarded, but it should be restricted to such questions as have been presented to, and decided by, this court at a former hearing of the same case and those necessarily involved in such decision and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only and not determined. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*..... 104
84. ———: **DIVIDED COURT.** The rule that a prior decision of this court in a given cause is the law of the case in all subsequent proceedings as to matters passed upon or involved in the decision, does not apply to propositions of law upon which the members of the court taking part therein were equally divided. *Baldwin v. Burt*..... 377
85. **Mortgages: OBJECTIONS INSUFFICIENT.** Objections made to the confirmation of a sale examined, and held insufficient. *Phoenix Mutual Life Ins. Co. v. Sparks*..... 215
86. **New Trial, Motion for.** This court will not review the proceedings of the district court by petition in error unless a motion for a new trial was made in the trial court, and a ruling obtained thereon. *Jones v. Hayes*, 36 Neb., 526, 54 N. W. Rep., 858, followed. *Marsh v. State*..... 372

**APPEAL AND ERROR—Continued.**

87. ———: **INDIVISIBLE.** Where two or more parties join in a motion for a new trial the motion is indivisible and unless it should be sustained as to all it must be overruled as to all. *McCarty v. Morgan* ..... 274
88. ———: **NO ASSIGNMENT OF ERROR.** This court will not, in an error proceeding, reverse a case where the error alleged was neither presented to the court below in the motion for a new trial nor assigned as error in the petition filed in this court. *Woodard v. Cutter*..... 84
89. **Nugatory Act: REFUSAL OF COURT TO PERFORM.** A judgment should be reversed only for errors which operate to the prejudice of the party complaining thereof. Hence the refusal of a court to perform an act which is purely nugatory and without legal force or validity ought not to be reviewed by this court, however informal or irregular the proceeding by which such refusal is expressed. *Baldwin v. Burt*.. 377
90. **Objection After Verdict of No Petition on File.** After having gone to trial upon the theory that the petition was duly filed, a defeated party can not, after verdict against him, be heard to urge that there was no petition on file and no cause pending before the court. *Heater v. Penrod*..... 711
91. **Order Overruling Motion.** When the defendant in an action to foreclose a tax lien files no pleading in the district court except a motion to strike plaintiff's petition from the files, the action of the trial court in overruling such motion can not be reviewed on appeal. *Seaman v. Atkinson*..... 197
92. **Parties in Appellate Court: JURISDICTION.** Where a judgment is entered in the district court in favor of a party to the proceedings, and error from such judgment is prosecuted to this court without making such party a party to the error proceedings, this court has no jurisdiction to determine the correctness of the judgment. *Willits v. Harlan County*.... 865
93. **Pleading: CONSTRUCTION AFTER JUDGMENT.** A petition will be construed liberally when attacked for the first time after judgment. *Chambers v. Barker*..... 523
94. ———: **JOINT PETITION IN ERROR: EFFECT: PARTIES.** Where two or more parties join in a petition in error, if the judgment is right as to one, it must be affirmed as to all. *Storm v. Holmes* ..... 16
95. ———: **MOTION TO STRIKE FROM REPLY.** It is not error to overrule a motion to strike, which includes, together with some matter which should have been stricken out of a reply, other matters which embody a proper reply. *German Ins. Co. v. Stiner* ..... 308
96. **Presumption from Record.** Where no part of the record

**APPEAL AND ERROR—Continued.**

- prior to an *alias* order of sale on which property is sold is brought to this court on an appeal from an order of confirmation, no irregularity or lack of authority to issue such *alias* order can be presumed. *National Life Ins. Co. v. Crandall* ..... 335
97. **Probate: JUDGMENTS OF DISTRICT COURT ON APPEAL FROM.** Judgments of the district court rendered on appeal from the probate side of the county court are reviewable only by petition in error. *Boales v. Ferguson*..... 172
98. **Reversal to Recover Nominal Damages.** A judgment will not be reversed in order to permit recovery of nominal damages, unless recovery of such damages will establish or preserve some right or entitle the plaintiff to costs. *School District v. Burress* ..... 555
99. **Signing Complete Record.** Requirements as to signing complete record are directory, and not essential to validity of court's action. *Colony v. Billingsley*..... 670
100. **Submission Ex Parte: STATEMENTS OF RECORD IN BRIEF.** Ordinarily when a cause is submitted without oral argument and upon the brief of the plaintiff in error alone, the statements of the brief as to the contents of the record will be treated as true and accurate. *Deering & Co. v. Walter*.. 364
101. **Supersedeas: CONDITIONS.** A supersedeas bond not conditioned as required by statute is insufficient to prevent the enforcement of the judgment or decree it was given to supersede. *Gillespie v. Morsman* ..... 162
102. **Transactions in Dispute: FINDINGS.** The trial court's determination, as to what transactions are sufficiently connected with those out of which the matter in dispute arose to be considered by the jury in passing upon it, will not, unless clearly wrong, be disturbed. *Buck v. Hogeboom*.... 853
103. **Transcript: ABSENCE OF: INTOXICATING LIQUORS.** A judgment of a district court, on an appeal from an order of an excise board, granting a license to sell malt, spirituous and vinous liquors, will not be reviewed by this court in the absence of a duly certified transcript of the application, remonstrance and the final order of such board in the premises. *Marferding v. Jones* ..... 441
104. ———: **ATTACKING SUFFICIENCY OF.** Except upon direct attack by motion assailing its sufficiency or accuracy, a transcript of the record of a district court transmitted to this court on error or appeal, imports absolute verity, and alleged errors and imperfections therein will not be corrected upon the oral representation of counsel made at the time of the submission of the case. *Wentz v. Meyer*..... 36

**APPEAL AND ERROR—Concluded.**

105. ———: ORDER APPEALED FROM WANTING. Where, on appeal, the order or judgment complained of is not included in the transcript, the appeal will be dismissed. *Jones v. Miller*.. 581
106. Verdict: CORRECTNESS OF. The verdict *held* to be sustained by the evidence and in accord with the instructions of the court. *Pope v. Kingman & Co*..... 184
107. ———: INSTRUCTIONS: REPLEVIN. Verdict examined, and *held*, not in conflict with instructions. *Bonawitz v. DeKalb*, 534
108. ———: SUPPORTED BY EVIDENCE. This court will not interfere with the verdict of a jury unless it is clearly unsupported by the evidence. *City of Omaha v. Doty*..... 726
109. Waiver by Stipulation for Sale of Property and Deposit of Money. A stipulation in an action pending in a district court that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk until it shall be determined which party to the action is entitled to them, and that, if the sale shall be made before the matter shall be fully litigated, the funds shall be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in this court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication. *Ryan v. Donley*, 6

**APPEARANCE. See JUSTICE OF THE PEACE.**

Party as Witness. An appearance of a party to testify as a witness is not an appearance to the action. *Commercial State Bank v. Rowley*..... 645

**ASSESSMENTS.** See APPEAL AND ERROR, 5. COUNTIES, 1. TAXATION, 17.

**ASSIGNMENTS.** See APPEAL AND ERROR, 6-9, 11. MORTGAGES, 2, 3. WILLS, 10.

**ATTACHMENT.** See DESCENT AND DISTRIBUTION, 1. GARNISHMENT, 6.

Resident of State But Not of County: VALIDITY OF LIEN.

Where an attachment proceeding is instituted against a defendant, who is a resident of this state, in a county in which such defendant does not reside and cannot be found, and makes no appearance, a levy on a judgment rendered on such proceedings is not a valid lien on the property of the defendant in the county in which such judgment was rendered. *Nelson v. City of Beatrice*..... 47

**ATTORNEY AND CLIENT.**

**Liens: PRIORITIES.** As against a client or client's assignee, an attorney engaged in prosecuting a claim before a county board has a lien for his services without filing claim or giving notice, and an assignee, whose rights arise while the matter is pending, takes subject to the attorney's rightful fees. *Maloney v. County of Douglas*..... 396

**AUTHENTICATION.** See APPEAL AND ERROR, 42. EXCEPTIONS, BILL OF, 1, 2.

**BANKRUPTCY.** See APPEAL AND ERROR, 10.

**BANKS AND BANKING.** See TRUSTS.

1. **Checks: TITLE OF INDORSEE: INDORSEE AS PARTY PLAINTIFF.** The indorsee of a check is possessed of the legal title thereto, and is the proper party plaintiff in an action for its collection. *Commercial State Bank v. Rowley*..... 645
2. **Depositories: RESTORATION OF FUND.** A depository of a trust fund who parts with no consideration and is not misled to his prejudice by reason of the deposit, is bound to restore the fund to the true owner on demand, although such deposit was made by an agent or trustee and, until such demand, the depository had no notice of its real character. *Union Stock Yards National Bank v. Campbell*..... 72
3. **Deposits: DUTY TO HONOR CHECKS.** Deposits in a bank create between it and the depositor the relation of debtor and creditor; and as long as this relation exists the bank is in duty bound to honor the checks of the depositor, and it can not refuse to do so on the ground that the money deposited belongs to some other person, or that the title of the depositor to it is defective. *Nehawka Bank v. Ingersoll*, 617
4. **Drafts: PAYMENT TO IMPOSTOR: FORGERY: LIABILITY.** Where A on receipt of release, made at A's request, of all claim against an estate, and purporting to have been made by B, procures a draft to his own order, indorses it to B's order and sends it by mail to the address given him as B's, and it is there received by the person executing the release and indorsed in B's name, A has no right of action against a bank which pays the draft to the holder, supposing him to be B, though he is in fact an impostor. *Hoffman v. American Exchange Nat. Bank*..... 217
5. ———: ———: ———: ———. Where an impostor assumes the name of another person, and thereby induces a third person to believe he is the person whose name he has assumed; and, acting on such belief, such third person indorses a draft, designating the payee by the name assumed by the impostor, and delivers it to such impostor in the be-

**BANKS AND BANKING—Concluded.**

- lief that he is dealing with the person whose name has been assumed, and the impostor indorses the draft, using such assumed name, and transfers it to an innocent purchaser, the purchaser takes title by such indorsement. *Idem*..... 222
6. **Knowledge of Outstanding Draft: RIGHT TO RETAIN DEPOSIT.** Knowledge by the bank that a draft has been drawn on the depositor and is outstanding would not justify a refusal by the bank to pay out the money deposited when demanded by the depositor; the law would not allow the bank to set up a *jus tertii* against the demand. *Nehawka Bank v. Ingersoll* ..... 617
7. **Trust Fund: APPROPRIATION: LIABILITY.** But if the bank appropriates the trust fund to the payment of a debt due the bank from the trustee, it would be liable therefor. *Idem*.
8. ———: **DEPOSIT TO PERSONAL ACCOUNT: PAYMENT: BONA FIDES: PLEADING: EVIDENCE.** In an action against a bank for money deposited by a trustee to his own account, evidence of payment by the bank on checks subsequently drawn by such trustee in good faith relying on his apparent title to said fund is inadmissible under general denial. Such fact, to be available as a defense, must be specially pleaded. *Cady v. South Omaha National Bank*, 46 Neb., 756, 65 N. W. Rep., 906, followed. *Union Stock Yards Nat. Bank v. Haskell* ..... 839

**BASTARDY.**

1. **Evidence Sufficient.** Evidence examined, and *held* sufficient to sustain a verdict of guilty on a charge of bastardy. *Guthrie v. State* ..... 28
2. ———. Evidence examined, and *held* to sustain verdict of guilty. *Ankeny v. Rawhouser* ..... 32

**BILLS AND NOTES.** See **GUARANTY: PRINCIPAL AND AGENT**, 5-7.

1. **Bona Fide Purchaser: DEFINITION.** The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant. *Lashmet v. Prall*..... 284
2. **Consideration: GAMING: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain finding of jury that the consideration of the note sued upon was not tainted with any indebtedness arising out of gambling transactions. *Connor v. Rumsey* ..... 740
3. **Evidence Sufficient.** Evidence examined, and *held* sufficient to sustain the judgment. *Schulz v. Modisett*..... 138  
*Clarkson Saw Mill Co. v. Patrick*..... 191  
*Wells v. Fetzer* ..... 551

**BILLS AND NOTES—Continued.**

4. **Indorsement: BEFORE DUE AS COLLATERAL: BONA FIDES.** where a negotiable promissory note is indorsed and transferred, before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value. *Connecticut Trust & Safe Deposit Co. v. Trumbo*..... 850
5. ———: ———: "FOR COLLECTION": NOTICE. An indorsement of a draft to a bank "for collection" is notice to subsequent holders that the indorsee is agent and not owner of the draft. *First Nat. Bank of Hastings v. Farmers & Merchants Bank* ..... 104
6. ———: PAYMENT: PRESUMPTIONS. Where partial payments are made upon a promissory note even after maturity it is a proper precaution for the party making such payments to see that they are indorsed upon the instrument. But there is no absolute legal requirement that payments be so indorsed, nor does a necessary legal presumption that such indorsements were made arise from the mere fact of payment. *Storey v. Kerr* ..... 568
7. **Parol Evidence: CONSIDERATION—LANDS FOR SUPPORT.** Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement. *Gifford v. Fox*... 30
8. ———: CONSIDERATION. While parol testimony may not be received to vary or contradict the terms of a promissory note, yet the considerations for which it was given may be established by parol testimony. *Idem*.
9. **Parties: INTERVENTION BY INDORSER: INSOLVENCY: ACTION AGAINST INDORSER.** An indorsee of notes secured by mortgage who has begun a suit for foreclosure upon them without making the indorser a party and who, while the suit is pending, transfers the notes to another party as collateral security, at the same time undertaking to complete the foreclosure, and who procures the dismissal of an intervention by the first indorser, in doing which he sets up the latter's insolvency, can not complain, in absence of any effort or request on his part for proceedings against his indorser, that the holder of the collateral brought none. *Stoddart v. American Nat. Bank of Omaha*..... 779
10. **Possession as Evidence of Ownership.** Possession of a promissory note is *prima facie* evidence of its ownership. *Michigan Mutual Life Ins. Co. v. Klatt*..... 872
11. **Stipulation Waiving Damages: CONSIDERATION.** If a note which is given in settlement of a past due indebtedness, and

**BILLS AND NOTES—Concluded.**

which extends the time of payment, contains a stipulation releasing and discharging all claims for damages arising out of the transaction in which the indebtedness was incurred, the stipulation rests upon a sufficient consideration and will be upheld. *Deering & Co. v. Walter*..... 361

**BONA FIDE PURCHASER.** See **BILLS AND NOTES**, 1. **EVIDENCE**, 1. **FRAUDULENT CONVEYANCES**, 4. **MORTGAGES**, 2.

**BONA FIDES.** See **BANKS AND BANKING**, 8. **BILLS AND NOTES**, 4. **BROKER**, 2. **EXECUTORS AND ADMINISTRATORS**, 3. **FRAUD. FRAUDULENT CONVEYANCES**, 2. **SCHOOLS AND SCHOOL DISTRICTS**, 3.

**BONDS.** See **COUNTIES**, 23. **EXECUTORS AND ADMINISTRATORS**, 2. **INJUNCTION**, 1. **PRINCIPAL AND SURETY. REPLEVIN**, 1-5. **SHERIFFS AND CONSTABLES**, 1-3.

**Replevin: APPEAL: EFFECT OF ONE ON THE OTHER.** A replevin undertaking is not discharged by the giving of a subsequent appeal bond in the same action; nor can the surety in the replevin undertaking insist that the appeal bond be first sued upon. *Campbell v. Laue*..... 63

**BROKER.**

1. **Commission: EVIDENCE SUFFICIENT.** Evidence found sufficient to sustain verdict for plaintiff. *Buck v. Hogeboom*.... 853
2. **Interest in Contract: BONA FIDES: INSTRUCTIONS.** Where evidence tended to show an interest in the contract of purchase on the part of real estate broker, instruction that he must, to entitle him to commissions, act in good faith and in the interest of his employer, *held* not erroneous. *Idem.*
3. **Right of Owner to Sell: COMMISSION: INSTRUCTIONS.** Where party claims compensation as real estate broker for procuring a purchaser of lands and no exclusive right of sale was claimed, an instruction to the effect that the seller had a right to trade his own property, and that if the broker was not instrumental in bringing about the making of a contract, he could recover no commission on it, *held* proper. *Idem.*

**BUILDING AND LOAN ASSOCIATIONS.**

1. *People's Building, Loan & Savings Association v. Backus*, *post*, page 463, followed in a case of the same nature. *People's Building, Loan & Savings Ass'n v. Palmer*..... 460
2. **Accounting: VALUE OF STOCK.** In an accounting between a foreign building and loan association and a member to whom a loan has been made, if credit is given the member for the amount paid upon the stock, it must be on the theory that such amount represents the value thereof, he having



**BUILDING AND LOAN ASSOCIATIONS—Continued.**

- elected to apply it on the debt. Hence, where such sum is credited to the borrower, no further deduction should be made for value of the stock. *Mercantile Co-operative Bank v. Schaaf* ..... 703
3. **Application of Dividends to Loan.** Any dividends declared or earned on the stock will inure to the borrower's credit, and this may be credited on the mortgage. *McDowell v. Pioneer Savings & Loan Co.* ..... 24
4. **Application of Expenses to Loan.** Payments made on account of operating expenses and fines paid belong to the company and should not be credited on the mortgage. *Idem.*
5. **Application of Payments to Loan: WHEN.** Payments made on the stock are not to be applied as payments on the loan until the borrower has elected to have them so applied, and credit for the value of the stock should be given at the time of such election, and not as of the date when the payments were made. *Idem.*
6. **Application of Premium and Interest to Loan.** Payments made for premium and interest, if not usurious, are not to be credited on the principal of the mortgage debt. *Idem.*
7. **Application of Stock Value to Loan.** In an accounting between a foreign building and loan association and one of its members, when there exists a stock purchase and a loan, the transaction is to be treated as a loan and the borrower has the right to have the value of his stock applied to reduce the indebtedness of the mortgage, if he so chooses. *Idem.*
8. **Stock Surrender for Loan: PAYMENT OF DUES: EFFECT.** When a member of a so-called mutual loan association, not incorporated under the laws of this state, borrows money of the society at an agreed rate of interest and surrenders to the society his shares of stock therein, and stipulates to continue the payment of monthly dues upon such shares, such stipulation is without consideration and is void, and the borrower's obligations to the association are discharged by the repayment of the loan with interest at the agreed rate. *Kear v. Eastern Building & Loan Ass'n.* ..... 895
9. **Stock Value: EVIDENCE.** The stock is to be taken as worth the amount that has been paid on it, in absence of evidence as to its actual value. *McDowell v. Pioneer Savings & Loan Co.* ..... 24
10. **Usury: EVIDENCE.** *People's Building, Loan & Savings Association v. Backus*, ante, page 463, followed in a case of the same nature. *People's Building, Loan & Savings Ass'n v. Carricker* ..... 465

**BUILDING AND LOAN ASSOCIATIONS—Concluded.**

11. ———: MORTGAGE FORECLOSURE. *People's Building, Loan & Savings Association v. Palmer*, ante, page 460, followed in a case of the same nature. *People's Building, Loan & Savings Ass'n v. Welton* ..... 462

**BURDEN OF PROOF.** See CONTRACTS, 4. PRINCIPAL AND AGENT, 14.

**CANCELLATION.** See MORTGAGES, 70.

**CARLISLE TABLE.** See DAMAGES, 1.

**CAVEAT EMPTOR.** See TAXATION, 1.

**CHALLENGE.** See TRIAL, 3.

**CHATTEL MORTGAGES.** See LANDLORD AND TENANT, 1. TAXATION, 13, 14.

1. Foreclosure. Issues examined, and found to be similar in all respects with the issues determined by this court in the case of *Meeker v. Waldron*, 62 Neb., 689, 87 N. W. Rep., 539, which case is approved and followed. *Meeker v. Waldron*.. 867
2. ———: INJUNCTION: EXECUTION BY OTHER CREDITORS: LIS PENDENS. The pendency of an action for the foreclosure of an alleged chattel mortgage in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, does not withdraw the property from pursuit, by general creditors, of the alleged mortgagor in another court by means of the ordinary procedure of a suit at law, judgment and execution. In such case the property is not in the custody of the law, but the principles applicable are those pertaining to the doctrine of *lis pendens*. *Ryan v. Donley*..... 6
3. Notice. The fact that a chattel mortgage was withheld from record from January 17 to March 12, following, with intent to avoid injury to mortgagor's credit, does not render it fraudulent as against one whose first dealing with mortgagor was on April 8, afterwards, and who does not appear to have examined the chattel mortgage records during the transactions. *News Publishing Co. v. Tyndale*..... 256
4. ———: POSSESSION: RIGHTS OF PURCHASER. Where the mortgagee of chattels is not in possession and his mortgage is not on file at the date of the levy, a purchaser at execution sale under a judgment against the mortgagor will take free of the mortgage though he had notice thereof prior to the sale. *Johns v. Kamarad* ..... 157

**CHECKS.** See BANKS AND BANKING, 1, 3.

**COLLATERAL ATTACK.** See JUDGMENT, 2, 12.

**COMMISSION.** See **BROKER**, 1, 3.

**COMMISSIONERS.** See **OFFICERS**, 3.

**COMPROMISE AND SETTLEMENT.** See **RECEIVER**, 1.

**COMPUTATION.** See **LIMITATION OF ACTIONS**, 2. **TAXATION**, 5.

**CONSENT.** See **FORCIBLE ENTRY AND DETAINER**, 3. **JUDGMENT**, 3.  
**MORTGAGES**, 37.

**CONSTITUTION.** See **RAILROADS**, 3.

**CONTINUANCE.** See **JUSTICE OF THE PEACE**.

**CONTRACTS.** See **INTOXICATING LIQUORS**, 3. **MASTER AND SERVANT**.  
**PLEADING**, 4. **VENDOR AND PURCHASER**, 1, 5.

1. **Breach: AGISTMENT: MEASURE OF DAMAGES.** In an action brought by plaintiff to recover damages for a breach of contract, whereby he was to receive as compensation for caring for a flock of sheep, one-half of the increase and one-half of the wool clip, *held*, that plaintiff was entitled to recover for such profits or advantages, the direct and immediate fruits of his contract as were lost by such breach of contract on the part of the defendant. *Schrandt v. Young*..... 546
2. ———: **EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the findings of the trial court. *Rosso v. Milwaukee Harvester Co.* ..... 212
3. ———: **FRAUD: NEGLIGENCE OF PARTY SIGNING.** In an action upon a contract, where the defense is that fraud was employed in securing the signature of one of the parties, the doctrine that the carelessness or negligence of the party in the signing of the contract estops him from disputing its contents is not applicable. *Spelts & Klosterman v. Ward*.. 177
4. ———: **ILLITERATE PARTY: BURDEN OF PROOF OF KNOWLEDGE.** Where one is dealing with an unlettered man, who can neither read nor write, and makes his mark to the instrument he executes, and there is testimony tending to show that he did not understand the contents of such paper, or that his signature was obtained by fraud, it is incumbent on the former to show by a preponderance of the evidence that the latter fully understood the object and import of the writing which he executed. *Idem*.
5. **Construction.** Certain written agreements examined and construed to mean that when J. H. M., Jr., and F. E. M. made certain payments upon a note of \$1,592.40 and reduced it to \$1,050 they should be released from further liability upon the note. *Mockett v. Boston Improvement Co.*.. 500

**CONTRACTS—Continued.**

6. **Damages: INSTRUCTIONS SUFFICIENT.** Instructions examined, and *held* to fully and fairly submit to the jury the plaintiff's and defendant's theory of the case. *Schaff v. Hamilton*, 577
7. **Equity: CONTRAVENTION OF STATUTE.** A court of equity will not enforce a contract made in contravention of a statute. *Buettgenbach v. Gerbig* ..... 889
8. **Evidence: EXPERT TESTIMONY OF INCREASE AND WOOL-CLIP OF SHEEP.** That prospective gains arising from the probable increase of the flock and the probable wool-clip are not so uncertain and contingent as to prevent proof by experts of the amount and value of such increase and wool-clip. *Schrandt v. Young* ..... 546
9. **Illiteracy: EVIDENCE SUFFICIENT.** Evidence examined, and found to sustain verdict and judgment. *Spelts & Klosterman v. Ward* ..... 177
10. ———: **INSTRUCTION.** Instruction set out in the opinion examined, and *held* properly given. *Idem*.
11. **Limitation in Equity.** If a contract is so broad in its language as to cover matters of which the parties were ignorant, equity may confine its application to the real purposes of the bargain. *Shelby v. Creighton*..... 264
12. **Oral: PAYMENT TO THIRD PARTY: VALIDITY.** An oral agreement by the grantee to pay part of the consideration agreed on as the purchase price of land sold, to a third party, may be enforced by the party for whose benefit it was made. *Dodd v. Skelton* ..... 475
13. **Parol Evidence: RULE AS BETWEEN PARTY AND STRANGER.** Doctrine as to inadmissibility of oral evidence to vary a contract has no application as between a party to it and a stranger where there appears no estoppel against showing the truth. *Crockett v. Miller*..... 292
14. **Quantum Meruit: CONTRACT AS EVIDENCE.** Although goods are sold or services rendered under an express contract fixing the price for them, an action may be maintained for their reasonable value. In such cases the plaintiff abandons the contract and waives any damages resulting from its breach, and his recovery can not exceed the contract price, but the contract may be given in evidence by either party as tending to prove the value. *Harrison v. Hancock*..... 522
15. **Sale of Land: EVIDENCE SUFFICIENT.** Evidence examined, and *held* sufficient to sustain the judgment. *Brown v. Silver* ..... 164
16. **Specific Performance: PLEADING: PETITION INSUFFICIENT.** Petition examined, and *held* that the facts therein stated are insufficient to constitute a cause of action. *Fisher v. Buchanan* ..... 158

**CONTRACTS—Concluded.**

17. ———: ———: **PROOF.** Where, by the terms of a contract, the conditions to be performed by the respective parties are concurrent, the plaintiff, in an action for specific performance, must allege and prove performance, or a tender of performance, of the conditions on his part to be performed, or such facts as will show that such tender would have been unavailing. *Idem.*
18. **Variance.** There is no variance between an allegation on a verbal contract and an unsigned memorandum of such contract alleged to have been made by the party charged at the time the contract was entered into, because such unsigned memorandum is not a written contract. *Brown v. Silver..* 164
19. **Voidable by Third Party: COUNTER-CLAIM OF DAMAGES: PLEADING DEFAULT.** Where both parties allege a contract voidable at the pleasure of the postmaster general, and avoided by him, a counter-claim of damages on account of such avoidance which fails to state that it was caused by the default of the other party presents no ground of recovery. *Stillings v. Van Alstine.....* 684

**CONVERSION.** See **WILLS**, 1, 2, 8.

**Damages: EVIDENCE SUFFICIENT.** Evidence examined, and held to support the finding of the jury. *Heater v. Penrod...* 711

**CORPORATIONS.** See **CREDITORS' SUIT**, 1. **PLEADING**, 5.

1. **Foreign: ACTION BY: STATUTES.** A foreign corporation may sue in the courts of this state without a compliance with the provisions of section 215, chapter 16, Compiled Statutes. *Holt v. Rust-Owen Lumber Co.....* 170
2. **Insolvency: SUBSCRIPTIONS: COLLECTION IN EQUITY: PARTIES.** In this state an action at law can not be maintained by a creditor of an insolvent corporation against a stockholder in such corporation for his unpaid subscription; such action can only be maintained by a bill in equity for the benefit of all the creditors of such corporation and against all the stockholders thereof whose subscriptions are unpaid. *Reed v. Burg .....* 117
3. **Notice, How Bound by.** A corporation can act only by its agents who are empowered to act for it, and can only be bound by notice to some of its officers or agents who have the power to act upon the notice, or to one whose duty it is to communicate the notice to its officers or agents who have this power. *Nehawka Bank v. Ingersoll.....* 617
4. **Trust Deed: AUTHORITY FOR: HOW GRANTED: NOTICE.** A resolution which authorizes the officers of a corporation to convey away or incumber all of its property by a trust agreement and a deed to trustees must at least be adopted

**CORPORATIONS—Concluded.**

by a majority of the board of directors duly assembled at a regular or called meeting of which due notice must have first been given. A resolution of that kind adopted at a called meeting of which the proper notice had not been given, and at which only one director was actually present who voted for himself and for another absent director by proxy, is not the act of the corporation and is void. *First Nat. Bank of Omaha v. East Omaha Box Co.*..... 820

5. ———: IN FRAUD OF CREDITORS: EVIDENCE SUFFICIENT. The fact that a corporation, which is being pressed by its creditors for the payment of their claims, makes a trust agreement and deed, whereby it conveys practically all of its property to trustees to secure debts due, to the amount of about \$2,500 and additional credit up to \$10,000, that its property so conveyed is worth many times that amount, and that such conveyance did in fact hinder and delay its other creditors and prevent them from collecting their just claims against it, taken together with conflicting evidence on the question of the intention of the parties to the transaction and all the other facts and circumstances surrounding it, is sufficient to sustain the finding of the trial court that the act was fraudulent and void as to such creditors. *Idem.*

6. ———: UNLAWFUL: RATIFICATION: CREDITORS. The conveyance of the officers of a corporation based upon a void resolution is void; but it may be ratified by the directors or stockholders by proper corporate action for that purpose, and also by a continued acquiescence therein on the part of the stockholders with full knowledge of all of the facts, but such ratification can not make the transaction valid as to third persons, creditors, where the same unlawfully hinders and delays them in the collection of their just claims against the corporation. *Idem.*

**COSTS.** See APPEAL AND ERROR, 16, 17.

**Discretion of Trial Court in Awarding.** In other actions than those in which costs follow of course, the discretion of the trial court in awarding costs will not be interfered with, except where facts regularly brought before this court show abuse of such discretion. *Porter v. Trompen.*..... 76

**COUNTIES.** See HIGHWAYS, 1, 2. **MANDAMUS,** 1.

1. **Assessments: CERTIFYING: MISTAKE: LIABILITY: STATUTES.**

A county is not liable, under section 131, article 1, chapter 77, Compiled Statutes, for a mistake of a city officer in certifying city assessments to the county treasurer. *Concordia Loan & Trust Co. v. Douglas County.*..... 124

**COUNTIES—Concluded.**

2. **Bonds: AUTHORITY TO ISSUE: ESTOPPEL AS SUPPLYING AUTHORITY.** Where bonds of a county are issued without any authority, the subsequent conduct of the officers of the county toward bonds so issued can not create an estoppel which will supply this want of original authority. *Washington County v. David*..... 649
3. ———: **ISSUANCE: LONG ACQUIESCENCE: CONSTRUCTION.** A grant of power to a county to issue bonds in aid of internal improvements, if seasonably challenged, should be strictly construed; but after a long acquiescence in the exercise of the power, and after the consideration has fully passed and bonds are issued under an apparent authority which have passed into the hands of purchasers for value, a more liberal rule of construction in favor of the existence of the power should be applied. *Idem*.
4. **Review of Claim: NOTICE OF APPEAL: STATUTES.** Where a claim has been disallowed by the county commissioners and a notice of appeal given to the county clerk within the time limited by statute, an indorsement upon such notice as follows: "I hereby accept service of the within notice," is sufficient proof that the service of the notice has been made. *Greeley County v. Gebhardt*..... 661

**COUNTY CLERKS.** See OFFICERS, 1.

**COURTS.** See NEW TRIAL.

1. **District: ENFORCING DECREE.** The district court has power to make any orders necessary to enforce its decrees, even after the adjournment of the term at which they are rendered. *Jones v. Miller* ..... 582
2. ———: ———: **PRESUMPTIONS.** The presumption is that such orders are regular and made upon proper notice. One who objects to them, for want of notice, where the record does not show such fact affirmatively, must sustain his objection by some proof in order to overcome such presumption. *Idem*.
3. **Journal Entry: CHANGE IN: VALIDITY.** Every change made by the clerk in a journal entry, previously approved by the court, is void unless made in pursuance of section 604 of the Code of Civil Procedure. *Fisk v. Osgood*..... 100
4. **Judicial Notice of Other Courts.** *Reed v. Burg*..... 117
5. **Jurisdiction: PRESUMPTION IN ABSENCE OF AFFIRMATIVE SHOWING.** In the absence of an affirmative showing in the record a court of general jurisdiction will be conclusively presumed to have jurisdiction of the parties to the action. *Nehawka Bank v. Ingersoll* ..... 617

**COURTS—Concluded.**

6. **Nunc Pro Tunc Order:** AUTHORITY TO GRANT. The authority of courts both of law and equity to enter judgment or decree *nunc pro tunc*, is an inherent power. *Van Etten v. Test*, 49 Neb., 725, followed. *Fisk v. Osgood*..... 100

**COVENANTS.** See LANDLORD AND TENANT, 1, 7.

**CREDITORS' SUIT.**

1. **Corporations: INSOLVENCY: SUBSCRIPTIONS UNPAID: PARTIES.**  
When a bill in equity is filed by the creditors of an insolvent corporation for the purpose of subjecting the unpaid subscriptions to the capital stock of such corporation to the payment of the corporate debts, it is necessary that each one of the delinquent subscribers to such capital stock be made a party defendant; and unless all are made parties defendant, or some good and sufficient reason appears upon the face of the petition, such as death, insolvency, or inability to reach with the process of the court the delinquent subscribers not joined as defendants, the petition is bad because of a non-joinder of parties defendant. *Fremont Package Mfg. Co. v. Storey*..... 325
2. **Evidence: INSUFFICIENT.** Evidence examined, and held not sufficient to sustain the judgment. *Westervelt v. Filter*.... 731
3. ———: **SUFFICIENT.** Evidence examined, and held to warrant the decree entered. *Doering v. Kohout*.....436, 438
4. **Execution Returned Nulla Bona.** The return of a sheriff upon an execution *nulla bona*, which has not been successfully impeached in a direct proceeding, is a sufficient basis for the maintenance of a creditor's bill, and the defendant can not in such suit question the truth of the return for the purpose of showing that the plaintiff has not exhausted his legal remedies. *Coffield v. Parmenter*..... 42

**CROPS.** See LANDLORD AND TENANT, 1.

**Levy and Sale of.** Growing crops are subject to levy and sale irrespective of their stage of growth. *Johns v. Kamarad*.... 157

**CROSS-EXAMINATION.** See TRIAL, 4, 5.

**CUSTOMS AND USAGES.** See LANDLORD AND TENANT, 6.

**DAMAGES.** See APPEAL AND ERROR, 64, 98. **BILLS AND NOTES,** 12. **CONTRACTS,** 1, 6. **CONVERSION.** **EMINENT DOMAIN,** 1, 2. **FIRES,** 2. **INJUNCTION,** 1, 2. **LANDLORD AND TENANT,** 4, 9, 12. **OFFICERS,** 5. **RAILROADS,** 1. **REPLEVIN,** 2, 5, 10. **VENDOR AND PURCHASER,** 1.

1. **Carlisle Table as Evidence.** A table showing the expectancy of life in healthy persons of different ages, printed in a law book of general acceptance and authority in courts of this state, as the Carlisle table of expectancy, is admissible



**DAMAGES—Concluded.**

- in evidence in cases where such evidence is applicable. *Sellers v. Foster*, 27 Neb., 118, followed. *Chicago, R. I. & P. R. Co. v. Hambel*..... 607
2. **Death, Action for: VALUE OF ESTATE.** In an action to recover damages for the death of a person it is incompetent for the defendant to show what the value of the estate of the deceased was. *Idem*.
3. **Deceit: EVIDENCE INSUFFICIENT.** Evidence examined, and held not to sustain a finding of damages against defendant, Emma L. Van Etten, for deceit and misrepresentation. *Van Etten v. Flannagan* ..... 59
4. **Instructions as to Measure of.** The court is not required to cover the rule as to the measure of damages in any one particular paragraph of its instructions. It will be sufficient if the instructions as a whole correctly state the rule. *Rath v. Rath* ..... 600
5. **Personal Injuries: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain the verdict. *City of Crete v. Hendricks* ..... 847
6. ———: **EXHIBITING INJURED MEMBER TO JURY: MUNICIPAL CORPORATIONS.** In an action for personal injuries it is not error to permit the plaintiff to exhibit the injured member to the jury after the introduction of evidence to the effect that it was permanently injured as and in the manner alleged in the petition, and that its condition at the time exhibited was wholly due to such injury. *Idem*.
7. **Petition Supported by Evidence.** Allegations of the petition held to be supported by the evidence. *City of Omaha v. Doty* ..... 726

**DECLARATIONS.** See WILLS, 4, 5.

**DEEDS.** See ESTOPPEL, 2. QUIETING TITLE, 1-4.

**DEFAULT.** See JUDGMENT, 11.

**DEPOSITARIES.** See BANKS AND BANKING, 2.

**DEPOSITIONS.**

- Objections—When to Be Made.** Objections to depositions other than for incompetency or irrelevancy must be presented to the court before the commencement of the trial. *Woodard v. Cutter*..... 84

**DESCENT AND DISTRIBUTION.**

1. **Advancements to Heir: EFFECT IN ATTACHMENT AGAINST ESTATE.** Where, pending the settlement of a decedent's estate, advancements have been made in good faith to an heir by the administrator with the assent of the coheirs,

**DESCENT AND DISTRIBUTION—Concluded.**

which were accepted by the recipient as in full of his share and as entitling the other heirs to his proportion of the remaining estate, the heir who has under such arrangement received his full share of the estate, has not thereafter an attachable interest in real property of the deceased. *Security Investment Co. v. Lottridge*..... 489

2. **Title Vests Subject to Right of Administrator.** Real estate other than the homestead of an intestate decedent, descends to his heirs and the title vests immediately in them subject to the administrator's right of possession and to its application in payment of decedent's debts. *Idem.*

**DESCRIPTION.** See EXECUTORS AND ADMINISTRATORS, 4. MUNICIPAL CORPORATIONS, 3. TAXATION, 4, 6.

**DIRECTING VERDICT.** See REPLEVIN, 10.

**DISCRETION.** See APPEAL AND ERROR, 18, 52. COSTS. MANDAMUS, 4. RECEIVER, 1. TRIAL, 10. WITNESSES, 2.

**DISMISSAL AND NONSUIT.** See PLEADING, 6.

1. **Reinstatement: EVIDENCE.** The denial by a district court of a motion to reinstate an action, voluntarily dismissed at the same term at which the motion is made, will not be reversed in the absence of evidence that the party making the application was laboring under some mistake or misapprehension of fact at the time of the dismissal. *Tighe v. Winger* ..... 155
2. ———: **IN EQUITY.** A suit in equity may be maintained for the purpose of reinstating a case erroneously dismissed, when there is no adequate legal remedy therefor. *Edney v. Baum* ..... 173

**DIVORCE.**

1. **Alimony: CIRCUMSTANCES AFFECTING AMOUNT.** In awarding alimony, the court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came, and how far, if at all, the wife contributed thereto. *Zimmerman v. Zimmerman*, 59 Neb., 80. *McKee v. McKee*..... 322
2. ———: **RULE GOVERNING AMOUNT: STATUTES.** While there is no fixed rule for determining the amount of alimony to be awarded under section 22, chapter 25, Compiled Statutes, such award should bear a reasonable relation to the husband's ability to pay, as disclosed by the evidence. *Idem.*
3. **Grounds: EVIDENCE SUFFICIENT.** Evidence examined, and held sufficient to sustain a decree of divorce on the ground of extreme cruelty. *Idem.*

**DRAFTS.** See **BANKS AND BANKING**, 4-6.

**DURESS.** See **EVIDENCE**, 3.

**EJECTMENT.**

1. **Instructions.** Instructions examined, and *held* properly given. *McCarthy v. Birmingham*..... 724
2. **Title from Common Source: EVIDENCE.** Where title is derived from a common source, plaintiff in an action of ejectment need only show title from this common source to enable him to recover on the strength of his own title. *Idem*.

**ELECTION.** See **TRIAL**, 6, 7.

**EMINENT DOMAIN.**

1. **Highways: APPRAISAL OF DAMAGES BY BRIDGE COMMITTEE: STATUTES.** A landowner filed a claim for damages for land proposed to be taken for a public highway. Instead of having his damages appraised by three disinterested electors appointed by the clerk, the matter was referred to the bridge committee of the board of supervisors, and this committee awarded him \$75. *Held*, That in the exercise of the right of eminent domain the statute should be strictly followed, and that the appraisement of damages by a committee of the board which was to settle and determine the amount to be allowed was such a departure from the method of ascertaining the plaintiff's damage as to invalidate the proceeding. *Nelson v. Harlan County*..... 537
2. **Railroads: DAMAGES: OCCUPATION: LIMITATION OF ACTIONS: EASEMENT: ADVERSE POSSESSION.** In 1887 a railroad company instituted proceedings to condemn two lots for railroad purposes. The appraisers appointed by the county judge found the value of the lots to be \$2,700 and assessed the damage of the owner at that sum. The company paid the money into court, but took an appeal to the district court, where, before the trial, it offered to allow judgment to be taken for \$1,266, which the owner refused to accept. On the trial the owner was awarded \$1,250, and judgment for the costs accruing after the offer was assessed against him. Thereafter, at the request of the railroad company, the owner conveyed the lots by warranty deed to G. W. Holdrege, trustee, the deed reciting that it was made to satisfy condemnation proceedings in the district court. The deed bears date of December 16, 1887. The lots remained vacant and unoccupied until May, 1899, when the former owner erected a building on the lots for use as a real estate office, and thereupon the railroad company enclosed the lots with a high fence, first moving thereon a building in which it kept lamps and oil, and which certain of its employees occupied. The gate in the fence was kept

**EMINENT DOMAIN—Concluded.**

locked and the former owner denied access to the building erected by him and he brought an action to restrain the company from interfering with his possession and use of the lots, claiming that the company had acquired only an easement in the lots and that he was entitled to the possession and use of the same in any manner that was not inconsistent with the easement of the company. *Held*, That his deed gave the company a fee-simple title to the lots, and that it was entitled to the exclusive possession thereof the same as any other owner of a fee title. The plaintiff also claimed that by its failure to occupy or use the lots for more than ten years the defendant had abandoned all right or title thereto. *Held*, That, conceding that the plaintiff's deed should be construed to convey only an easement in the lots, still, as the easement was conveyed by deed, it could only be extinguished by adverse possession for the same length of time that is required to extinguish the title of the owner of the fee. *Struve v. Republican V. R. Co.*.... 585

**EQUITY.** See APPEAL AND ERROR, 19, 20. CONTRACTS, 7, 11. CORPORATIONS, 2. EVIDENCE, 15. EXECUTORS AND ADMINISTRATORS, 4. JUDGMENT, 5. MORTGAGES, 43.

1. **Action in:** EVIDENCE SUFFICIENT. Evidence examined, and *held* sufficient to sustain the judgment of the district court. *Phoenix Ins. Co. v. Boehl* ..... 272
2. **Adequate Remedy at Law:** DEFINITION. The term "adequate remedy at law" means that the remedy at law must be plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Carter v. Warner*..... 688

**ESTOPPEL.** See APPEAL AND ERROR, 22, 66. COUNTIES, 2. PRINCIPAL AND AGENT, 9.

1. **Pleading.** When an estoppel is relied on it must be pleaded. *Carnahan v. Brewster*..... 366
2. **Recital in Deed:** GRANTEE ASSUMING ILLEGAL TAXES: EVIDENCE. The covenants in a deed against incumbrances excepting all taxes and assessments and concluding with "which grantee assumes and agrees to pay," in the absence of any evidence that anything on that account was deducted from the purchase price, will not estop the grantee from defending against the payment of illegal and void assessments. Evidence of admissions examined, and *held* not to create an estoppel. *Orr v. City of Omaha*..... 771

**EVICTON.** See LANDLORD AND TENANT, 2-4.

**EVIDENCE.**

**General.** See APPEAL AND ERROR, 2, 3, 23-39; 50, -59, 75, 108.

BANKS AND BANKING, 8. BILLS AND NOTES, 2, 3, 7, 8. BUILDING AND LOAN ASSOCIATIONS, 9, 10. CONTRACTS, 8, 13, 14, 17. DAMAGES, 1, 7. DISMISSAL AND NONSUIT, 1. EJECTMENT, 2. ESTOPPEL, 2. EXCEPTIONS, BILL OF, 1, 4. INSURANCE, 4. JUDGMENT, 5. JUDICIAL SALES, 16. MORTGAGES, 16, 44, 58. PARTNERSHIP. REPLEVIN, 6. TAXATION, 2, 7. WILLS, 6. WITNESSES, 1.

**Insufficient.** See CONTRACTS, 16. CREDITORS' SUIT, 2. DAMAGES, 3. HOMESTEAD, 1, 5. MORTGAGES, 4, 54. PRINCIPAL AND AGENT, 6, 10, 11.

**Sufficient.** See BASTARDY, 1, 2. BILLS AND NOTES, 2, 3. BROKER, 1. CONTRACTS, 2, 9, 15. CONVERSION. CORPORATIONS, 5. CREDITORS' SUIT, 2. DAMAGES, 5. DIVORCE, 3. EQUITY, 1. FRAUDULENT CONVEYANCES, 1. LANDLORD AND TENANT, 5, 9. LIBEL AND SLANDER, 1. MORTGAGES, 5, 15, 45, 46, 69. MUNICIPAL CORPORATIONS, 5. PRINCIPAL AND AGENT, 3, 5. RAILROADS, 1. REPLEVIN, 7. SCHOOLS AND SCHOOL DISTRICTS, 3. TAXATION, 8. VENDOR AND PURCHASER, 2.

1. **Consideration: BONA FIDE PURCHASER.** Evidence examined and *held* to sustain a consideration for the notes and mortgage and that plaintiff was an innocent purchaser for value before maturity. *Loan & Trust Savings Bank v. Stoddard*, 486

2. **Fraud Appearing First in Defendant's Evidence.** Where plaintiff's evidence fails to show a *prima facie* case, but defendant goes on without objection and supplies facts which in connection with that evidence, if taken as true, would make out a case for plaintiff, it is not error to permit plaintiff to rebut a showing as to fraud which appears for the first time in defendant's evidence. *Crockett v. Miller*..... 292

3. **Handwriting: SAMPLES OBTAINED BY DURESS OR FRAUD: PROOF.** If writings offered as evidence of handwriting are admitted by a party to be his, but he claims that their form is the result of duress or fraud, the proper course is to show such fact for the purpose of affecting their weight. *Schmuck v. Hill* ..... 79

4. **Identity and Execution of Instrument: SIGNATURES.** Testimony of a subscribing witness to an instrument that he recognizes his signature thereto and is acquainted with the parties, and, from that and his uniform practice not to witness any paper unless actually executed before him, he is satisfied and will testify that it was so executed, there being no showing to the contrary, is sufficient evidence of its execution. *Oheston v. Wilson* ..... 674

5. **Instructions: INSUFFICIENCY OF PROOF.** When the evidence which has been offered is not sufficient in law to make out

**EVIDENCE—Continued.**

- the case of the party who has offered it, it is the duty of the court to so instruct the jury. *Hiatt v. Brooks*, 17 Neb., 33, followed. *Hill v. Pitt* ..... 151
6. **Instruments: SIGNATURES.** An acknowledged instrument, of a kind permitted to be acknowledged and recorded, is admissible in proof without evidence of the authenticity of the signatures. *Brown v. Collins* ..... 149
7. **Judicial Notice of Laws of Other States: PRESUMPTIONS.** This court will not take judicial notice of the laws of other states, but, in the absence of pleading and proof as to such laws, will presume them to be the same as our own. *People's Building, Loan & Savings Ass'n v. Backus*..... 463
8. **Land: VALUES: AUTHORIZED BID.** In proving the value of land at a particular time it is not competent to show what a witness says he was authorized to bid for the land at that time; and the fact that he claims to have been authorized to bid for a party financially responsible would not change the rule. *First Nat. Bank of Harvard v. Hockett*..... 512
9. **Memoranda, Testimony from: WEIGHTS OF CORN.** A motion to strike out all of a witness' evidence as to number of bushels of corn furnished by one party to the other, where the witness was present at its delivery, saw the loads, and testified as to the quality and character of the crop on the land, not erroneously overruled, though the witness had, without objection, testified as to weights from memoranda which subsequently appeared to have been taken from scale tickets, and witness was not present at the weighing. *Garrison v. Murphy* ..... 696
10. **Preponderance: RULE NOT CHANGED UNDER CERTAIN FACTS.** The rule that a plaintiff in a civil action is only required to prove his case by a preponderance of the evidence is not altered by the fact that the acts charged upon the defendant are highly discreditable or even criminal. *Schmuck v. Hill*. 79
11. **Record from Foreign State: STATUTES.** A judicial record of another state, authenticated as provided in section 414 of the Code, is admissible in evidence without further proof that the court from which it comes is one of record. *Brown v. Collins* ..... 149
12. **Secondary: LETTER, CONTENTS OF: FOUNDATION FOR INTRODUCTION.** Before the contents of a lost letter can be introduced in evidence there must be testimony of its loss and also testimony tending to prove the handwriting, or that it came from the alleged writer or his authorized agent, or was received in due course of mail in answer to letters previously mailed to the address of the alleged writer. *Whitwell v. Johnson* ..... 66

**EVIDENCE—Concluded.**

13. ———: NOT SUFFICIENT. Evidence examined, and *held* not to be sufficient identification to permit the contents of the letter to be received in evidence. *Idem.*
14. **Statements of Parties: ADMISSIBILITY.** Statements of parties directly relating to the issues are admissible on behalf of the opposing party as independent testimony. *Carlson & Hanson v. Holm* ..... 38
15. **Surface Waters: EQUITY FINDINGS: CONFLICTING EVIDENCE.** Findings of the court examined, and found to be sustained by the evidence. The findings of a court of equity are entitled to the same consideration as the verdict of a jury in a law case; and if the evidence upon which they are based is conflicting, a court of review will not disturb them unless clearly wrong. *Andrews v. Village of Steel City*..... 676

**EXAMINATION.** See TRIAL, 8.

**EXCEPTIONS.** See APPEAL AND ERROR, 18, 41, 44, 49, 60-62.

**EXCEPTIONS, BILL OF.** See APPEAL AND ERROR, 42, 43.

1. **Authentication: EVIDENCE, ON APPEAL AND ERROR.** Where a bill of exceptions purporting to contain the evidence in a case is not authenticated by the clerk of the district court, it is not properly before the supreme court and will not be examined; and questions presented on error, or appeal, depending upon matters of evidence, can not be decided. *Palmer v. Mizner* ..... 903
2. ———: **JUDGMENT CONFORMS TO PLEADINGS: APPEAL AND ERROR.** In such a case, if the judgment or decree of the trial court conforms to and is supported by the pleadings, it will be affirmed. *Idem.*
3. **Impeachment by Affidavit.** A bill of exceptions allowed and signed by the trial judge becomes a part of the record in the case, and its recitals cannot be impeached by affidavits filed for that purpose. *Phoenix Ins. Co. v. Howe*..... 20
4. **Mortgages: EVIDENCE OFFERED ON OBJECTIONS TO APPRAISAL.** Such objections are unavailable unless the evidence offered thereon is preserved in bill of exceptions. *Simpson v. Snook*, 412
5. **Practice, Rules of.** The rules of practice in a district court alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions. *Jones v. Cleary* ..... 541
6. **Purpose.** The function of a bill of exceptions is to bring into the record the facts on which the trial court decided the questions of law presented for review. *State v. Fawcett*.. 243

**EXECUTION.** See CHATTEL MORTGAGES, 2. CREDITORS' SUIT, 4. GARNISHMENT.

**Title: COMPLICATED: REFUSAL OF SHERIFF TO SELL: DAMAGES.**

No damage appearing to have been sustained and the trial court finding that the complicated condition of the title justified the sheriff in refusing to sell real estate levied upon by execution, decreed, directing sale but exonerating sheriff, upheld. *Porter v. Trompen*..... 76

**EXECUTORS AND ADMINISTRATORS.**

1. **Abatement.** An action does not abate by the removal or discharge of an administrator as party plaintiff during its pendency. *Edney v. Baum* ..... 173
2. **Bonds: LIABILITY FOR LEGACIES: WILLS.** Executors who are also residuary legatees and have given bond under section 165 of the decedent act, take the estate free of the lien of such legacies, but if, instead of such bond, the bond required of a general executor is given, such legacies will be a charge upon the estate. *Herditchka v. Foss*..... 428
3. **Purchase of Heir's Interest: BONA FIDES.** An administrator occupies a fiduciary relation to the heir of his intestate, and where by contract with the heir such administrator purchases the heir's interest in the real estate of his intestate, the transaction will be rigidly scrutinized by a court of equity. However, if the transaction is in good faith and wholly without fraud, it may be treated as similar transactions between strangers. *Shelby v. Creighton*..... 267
4. **——: MISTAKE IN DESCRIPTION: CORRECTION IN EQUITY.** Where, in such case, the contract by mutual mistake is made to convey more than was intended or in the contemplation of the parties thereto, a court of equity may reform the contract to conform to the intention of the parties. *Idem*.
5. **Sales: RATIFICATION.** Where an administrator transfers a note, past due, belonging to the estate without an order of the county court, and receives therefor the full amount due thereon, and such transfer is afterward approved and confirmed by the county court, the transferee takes a good title, which dates from the time of the transfer. *Holt v. Rust-Owen Lumber Co.* ..... 170

**EXEMPTIONS.** See HOMESTEAD, 3. JUDGMENT, 9. PARTITION.

**Proof of Property: INSTRUCTIONS.** When the pecuniary responsibility of a person who is the head of a family is sought to be ascertained by proof of the amount of his property and indebtedness, it is error to refuse to instruct the jury, that for the purposes of the inquiry the fact that a portion of his property is exempt should be taken into account by the jury. *Winside State Bank v. Lound*..... 210



**FEES.** See GARNISHMENT, 4. INJUNCTION, 1.

**FINDINGS.** See APPEAL AND ERROR, 48-51, 102. EVIDENCE, 15, JUDGMENT, 6, 7. TRIAL, 9, 10.

**FIRES.**

1. Care and Caution: WHIRLWINDS. A party who kindles a fire on his own land can not be charged with negligence in not guarding against a whirlwind or extraordinary high winds which may ensue and carry the fire beyond his control, if, before setting it, he took such precautions as a man of ordinary caution would exercise to confine it to his own premises, and exercised the same care and watchfulness to prevent its escape while burning. *Bock v. Grooms*..... 803
2. Negligence, Rule in Absence of: DAMAGES. One may lawfully kindle a fire on his own land for the purpose of husbandry, and he will not be liable for damage caused by such fire to the property of third parties, in the absence of negligence in kindling the same or in not keeping it confined to his own premises. *Idem*.

**FORCIBLE ENTRY AND DETAINER.**

1. Appeal and Error: STATUTES. No appeal lay to the district court from the judgment of a justice of the peace in proceedings in forcible entry and detainer prior to the enactment of chapter 85, Laws of 1901. *Sullivan v. Haight*..... 371
2. Appeal Prior to 1901. Prior to 1901 there was in this state no valid statute authorizing an appeal from the judgment of a justice of the peace in an action for the forcible entry and detention, or forcible detention only, of real property. *Selleck v. Feeney* ..... 739
3. Jurisdiction: CONSENT OF PARTIES. The jurisdiction of the district court in such action, being derivative only, is not aided by consent of parties. *Ettenheimer v. Wallman*, 63 Neb., 647, 88 N. W. Rep., 859, followed. *Idem*.

**FORGERY.** See BANKS AND BANKING, 4, 5.

**FRAUD.** See CONTRACTS, 3. EVIDENCE, 2, 3. JUDGMENT, 2. JUDICIAL SALES, 4. MORTGAGES, 15, 16, 23, 24. VENDOR AND PURCHASER, 2.

**Instructions:** GOOD FAITH PRESUMED. Instruction that good faith is presumed in business transactions, and fraud, if alleged, must be shown, *held*, correct, as applied to matters in which the parties do not appear to have any family relationship. *Crockett v. Miller*..... 292

**FRAUDULENT CONVEYANCES.** See LIMITATION OF ACTIONS, 3. VENDOR AND PURCHASER, 3.

1. Action to Set Aside: EVIDENCE. Evidence examined, and *held* sufficient to sustain the findings of the trial court. *Continental Nat. Bank of Chicago v. Levy*..... 694

**FRAUDULENT CONVEYANCES—Concluded.**

2. **Bona Fides: INSTRUCTION.** A transfer made to a third person for the sole purpose of preferring and satisfying a *bona fide* creditor is not voidable as hindering or delaying other creditors. But such transfer must be made in good faith for that purpose, and an instruction which omits this element of the rule is properly refused. *Pope v. Kingman & Co.* ..... 184
3. **Indebtedness of Plaintiff to Defendant a Defense.** To an action by a judgment creditor to set aside conveyances alleged to have been made in fraud of the judgment, it is a defense that the plaintiff is indebted, upon simple contract, to the judgment debtor in an amount equal to the judgment. *Lashmett v. Prall* ..... 284
4. **Intent: PARTICIPATION IN OF DEBTOR AND CREDITOR: APPLICATION TO PURCHASER.** The rule that where a *bona fide* creditor takes property of the debtor in satisfaction of his claim the transaction is not voidable by reason of fraudulent intent of the debtor unless the creditor participated in such intent, does not apply to a purchaser, not himself a creditor, who, by direction of the debtor, pays the purchase price to a preferred creditor. *Pope v. Kingman & Co.* ..... 184

**GAMING.** See **BILLS AND NOTES, 2.**

**GARNISHMENT.**

1. **Affidavit: AGENCY, RECITAL OF.** The better practice requires the fact of agency in an affidavit for attachment or garnishment to be sworn to by the affiant and not set out by way of recital merely. *Jeary v. American Exchange Bank* ..... 657
2. ———: **FOR SUMMONS INSUFFICIENT.** An affidavit for a summons in garnishment examined, and held fatally defective. *Idem.*
3. **Execution Prior to: STATUTES.** Issuance of execution against the attachment debtor and return thereof unsatisfied are not required before proceeding against a garnishee under section 225, Code of Civil Procedure, for unsatisfactory answer. *Pope v. Kingman & Co.* ..... 184
4. **Fees: PREPAYMENT.** A garnishee who appears and answers without objection waives his right to prepayment of his fees. *Idem.*
5. **Judgment Against Garnishee Erroneous: LIABILITY TO INDORSEE: APPEAL.** A garnishee should appeal from an erroneous judgment against him as acceptor of a draft or order rendered in a proceeding against the drawer, since he would remain liable to an indorsee, if he pays such judgment. *Commercial State Bank v. Rowley* ..... 645

**GARNISHMENT—Concluded.**

6. **Liability of Garnishee: HOW AND WHEN FIXED: ATTACHMENT.** The liability of a garnishee is to be determined by the status of the fund in his hands at the time his answer is taken, when it appears that at the time of the service of notice of garnishment, the fund sought to be reached was not the subject of garnishment, but afterward, and before the taking of the answer, became so. *First Nat. Bank of Pawnee City v. Manning* ..... 3

**GUARANTY.**

- Bills and Notes: PURCHASE AT TAX SALE: LIENS.** *Concordia Loan & Trust Co. v. Schouboe* ..... 116

**GUARDIAN AND WARD.**

- Trial: ABSENCE OF PLAINTIFF: INSANITY.** Where an action is carried on by a guardian, it is not error to allow a showing of his appointment and of a finding that plaintiff is insane solely to account for the latter's absence. *Buck v. Hogboom* ..... 853

**HIGHWAYS. See EMINENT DOMAIN, 1.**

1. **Counties: AUTHORITY TO CONSTRUCT CULVERT.** On the facts stated, *held*, that the county board had authority to direct the road overseer to place a culvert across a highway in his district. *Fokenga v. Churchill* ..... 304
2. ———: **ORDER TO BUILD CULVERT: DESIGNATION OF PLACE.** It is not necessary in an order to construct a culvert to designate the specific point on the highway at which such culvert is to be placed. *Idem*.
3. **Culvert, Construction of: INJUNCTION: WATERS AND WATERCOURSES.** In an action to enjoin the construction of such culvert, the question is not whether it would divert the surface drainage from its natural course to the plaintiff's injury, and, if so, whether it was the best and most advantageous means of disposing of such water, but whether such culvert was reasonably necessary to a proper maintenance of the road. *Idem*.

**HOMESTEAD. See JUDGMENT, 9.**

1. **Abandonment: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* to not show an abandonment of the homestead. *Buettgenbach v. Gerbig* ..... 889
2. **Conveyance or Incumbrance: STATUTES.** The statutory provisions for the conveyance or incumbrance of the homestead are exclusive. *Idem*.
3. **Exemption: OCCUPATION.** In order that property may be exempt from execution sale as a homestead, it must either be occupied by the debtor, or there must be a *bona fide*

**HOMESTEAD—Concluded.**

- intention to occupy the property as such at some future time. *Clement, Bane & Co. v. Kopietz*..... 18
4. **Mortgages:** ACKNOWLEDGMENT BY HUSBAND AND WIFE: VALIDITY. A mortgage executed on the homestead of the grantors is absolutely void unless acknowledged by both husband and wife. *Hedbloom v. Pierson*..... 799
5. **Occupation:** EVIDENCE INSUFFICIENT. Evidence examined, and *held* to show neither a *bona fide* occupation of the premises as a homestead, nor an intention to so occupy the premises at any future time. *Clement, Bane & Co. v. Kopietz*.... 18
6. **Timber:** IMPROVEMENTS, TITLE TO. A person entitled by law to pre-empt a tract of land, or to hold it under the timber culture act, and who is recognized by the register and receiver of a United States land office, and is by them allowed to make a filing on a tract of the public land within their district legally open to pre-emption, takes the same and all permanent improvements thereon, if any, together with the exclusive right of possession thereof, free from the claims of all persons except the United States. *Hiatt v. Brooks*, 17 Neb., 33, followed. *Hill v. Pitt*..... 151

**HUSBAND AND WIFE.** See HOMESTEAD, 4. INSURANCE, 1.

1. **Alienation of Affections:** HONEST ADVICE AS DEFENSE MUST BE PLEADED AND PROVED. In an action by a wife, against her father-in-law, for alienating the affections of her husband and causing him to abandon her, parental advice, honestly given without malice, and with the intention of benefiting the son, is a defense; but where such advice is not pleaded nor proven at the trial, the court did not err in refusing to give instructions based on that theory. *Rath v. Rath*..... 600
2. ———: INSTRUCTION AS TO CONTROLLING CAUSE. In an action by a wife against one, for alienating the affections of her husband, causing him to abandon her, an instruction which informs the jury "That if the conduct of the defendant was the controlling cause which induced her husband to leave her, and that without such conduct her husband would not have abandoned her, then she would be entitled to recover, although there might have been other causes contributing to the same result," is a fairly correct statement of the law. there was no error in giving such an instruction. *Idem*.

**HYPOTHETICAL QUESTIONS.** See WITNESSES, 3.**IMPEACHMENT.** See EXCEPTIONS, BILL OF, 3. JUDICIAL SALES, 16.**IMPROVEMENTS.** See HOMESTEAD, 6.**INDEMNITY.** See SHERIFFS AND CONSTABLES, 1-3.

**INJUNCTION.** See APPEAL AND ERROR, 53. CHATTEL MORTGAGES, 2. HIGHWAYS, 3. SCHOOLS AND SCHOOL DISTRICTS, 2. WATERS AND WATERCOURSES, 2.

1. **Action on Bond: ATTORNEYS' FEES AS DAMAGES.** Where attorneys' fees are sought to be recovered as damages in a suit on an injunction bond it is incumbent upon the plaintiff to show either that injunction was the only relief asked in the suit, or that the fees were paid solely for the purpose of procuring a dissolution of the injunction as distinguished from fees paid for the trial of the principal issues involved in the case. *First Nat. Bank of Harvard v. Hockett*..... 512
2. **Against Judgment: COLLECTION, DELAY IN: MEASURE OF DAMAGES.** Where the collection of a judgment is enjoined and one of the elements of damage sought to be recovered is for delay in its collection, the proper measure for this element of damage is additional court costs, if any, and interest at the rate which the judgment draws during the time of such delay. *Idem*.
3. **Dissolution: STATUTES.** A subsequent order, which in no degree relaxes the restraint imposed by a temporary injunction, is not a dissolution or modification thereof, within the meaning of section 679 of the Code of Civil Procedure. *State v. Fawcett* ..... 503
4. **Gates on Railroad Right of Way: DEFENSE.** The fact that the gates were heavy and unsuitable would constitute no defense. *Arthelm v. Chicago, R. I. & P. R. Co*..... 444
5. ———: **PLEADING.** A petition stating that a land owner without excuse persistently leaves open, as well as injures and destroys, gates on a railway company's right of way, at a farm crossing kept for defendant's access to his own premises, discloses a right to an injunction. *Idem*.
6. **Mandatory: WHEN GRANTED.** A mandatory injunction will not be granted except to prevent a failure of justice, and then only when the right is clearly established. *Buettgenbach v. Gerbig* ..... 889

**INSANITY.** See GUARDIAN AND WARD.

**INSOLVENCY.** See BILLS AND NOTES, 9. CORPORATIONS, 2. CREDITORS' SUIT, 1.

**INSTRUCTIONS.** See APPEAL AND ERROR, 43, 54-72, 107. BROKER, 2, 3. CONTRACTS, 6, 10. DAMAGES, 4. EJECTMENT, 1. EVIDENCE, 5. EXEMPTIONS. FRAUD. FRAUDULENT CONVEYANCES, 2. HUSBAND AND WIFE, 2. INSURANCE, 4. MUNICIPAL CORPORATIONS, 1, 2. REPLEVIN, 8. TRIAL, 11, 20. WILLS, 9.

**INSTRUMENTS.** See EVIDENCE, 6.

**INSURANCE.**

1. **Application by Husband and Wife: INTEREST OF HUSBAND.** The fact that the husband of a married woman signs with her an application for insurance on her separate property, does not invest him with any right or interest in the policy issued on such application, and in which the woman alone is named as the insured. *Union Ins. Co. v. McCullough*...198, 203
2. **Approval by Home Office. PROPERTY DESTROYED BEFORE SUCH APPROVAL: LIABILITY.** Where a written application for insurance is made upon a blank form which provides that no liability shall attach until the application has been approved by the home office, and the application, together with the premium, is delivered to the agent of the company, and, before the application has been approved by the home office, the property insured is destroyed by the hazard insured against, *held* that the insurance company is not liable for loss occurring before such approval. *St. Paul Fire & Marine Ins. Co. v. Kelley*..... 720
3. **Burning by Third Party Not a Defense.** That an insured building was burned by a third party is no defense to an action on the policy, in the absence of a showing that the party insured was privy to such burning. *Union Ins. Co. v. McCullough* .....198, 203
4. **Evidence: WAIVER: INSTRUCTIONS.** Evidence *held* to warrant the submission to the jury of question as to whether or not the insurance company was aware of facts as to conditions of the policy at the time of the acts relied upon as a waiver, and instruction No. 5, set out in the opinion, *held*, to properly submit that question. *German Ins. Co. v. Stiner*, 308
5. **Mutual: EMPLOYMENT OF SOLICITORS AS DEFENSE TO PREMIUM NOTE.** Violation of the statute prohibiting employment of solicitors by a mutual hail insurance company is for the state to complain of, and is not available to a member as a defense to an action upon his premium note. *Randall v. Phelps County Mutual Hail Ins. Ass'n*..... 530
6. ———: **PREMIUM NOTE: DEFENSE OF NO SURETY.** A member of a mutual insurance company who has given a premium note thereto can not defend an action upon such note on the ground that he was not required to furnish a surety upon the note as provided by the rules of the company. *Idem*.
7. **"Vacancy" Clause: CHANGE OF TENANTS.** Where, in an application for insurance, the premises are described as in possession of a tenant, a provision in the policy that it should become void if the premises became vacant or unoccupied is not violated by such a vacancy as is occasioned by the removal of the tenant in possession to allow the entry of another tenant. *Union Ins. Co. v. McCullough*.....198, 203

**INTENT.** See FRAUDULENT CONVEYANCES, 4. VENDOR AND PURCHASER, 4. WILLS, 3.

**INTEREST.** See BROKER, 2. BUILDING AND LOAN ASSOCIATIONS, 6. MORTGAGES, 68. SHERIFFS AND CONSTABLES, 3. TENDER, 1. USURY, 2.

**Pleading.** No express allegation that interest is due is required to enable a plaintiff to recover interest upon a debt or claim which, without any contract therefor, bears interest as a matter of law. *Peterson v. Mannix*..... 795

**INTERVENTION.** See BILLS AND NOTES, 9.

**INTOXICATING LIQUORS.** See APPEAL AND ERROR, 103. TRIAL, 15.

1. **Amending Record in District Court.** Where, on the hearing in the district court, it is found that for any reason a portion of the record and proceedings before the licensing board has not been sent up either in the transcript or bill of exceptions, it is proper for the court, upon an application therefor, to order the same brought up and filed in the case. *Persinger v. Miller* ..... 807
2. **Application: QUALIFICATIONS OF SIGNERS: FINDINGS OF FACT ON APPEAL.** Where the question of fact, as to the qualifications of certain signers to an application for a license to sell intoxicating liquors, has been passed upon by the licensing board, and the district court, in a hearing on appeal from the judgment and order of such board based in part on such finding of fact, has examined the evidence and record and arrived at the same conclusion, such finding of fact and order of the board will not be disturbed on the hearing of a petition in error in this court unless clearly wrong. *Waugh v. Graham*, 47 Neb., 153, approved and followed. *Idem*.
3. **Contracts: CONSIDERATION.** No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. *Storz & Iler v. Finklestein*, 46 Neb., 577, followed. *Schoenhofen Brewing Co. v. Whipple*.. 704
4. **Remonstrance: OBJECTIONS URGED FIRST IN DISTRICT COURT.** Objections not set forth in the remonstrance to an application for license to sell intoxicating liquors, and not urged on the hearing before the licensing board, should not be considered in the hearing on appeal in the district court, and will not be considered on a petition in error to this court. *Persinger v. Miller* ..... 807
5. **Sale: VALIDITY: LEX LOCI.** The validity of a sale of intoxicating liquors is determined by the law of the place at which the sale is made. *Schoenhofen Brewing Co. v. Whipple* ..... 704
6. **"Slocumb Law": STATUTES.** Chapter 50 of Compiled Stat-

**INTOXICATING LIQUORS—Concluded.**

utes of Nebraska, commonly known as the "Slocumb Law," is a rigid, drastic and prohibitive enactment denouncing all sales of intoxicating liquors not made strictly in compliance with its provisions. *Idem.*

**ISSUES.** See APPEAL AND ERROR, 73, 74.

**JUDGMENT.** See APPEAL AND ERROR, 7, 75, 97. GARNISHMENT, 5.

INJUNCTION, 2. MORTGAGES, 49. PROCESS, 1. REPLEVIN, 1.

4, 12. SHERIFFS AND CONSTABLES, 2. TAXATION, 15. TRIAL,

18. WILLS, 10.

1. **Absolute: DEFINITION.** An absolute judgment is one which is operative and effective. *Brown v. Helsley*..... 69
2. **Action Upon a Judgment: COLLATERAL ATTACK OF FIRST JUDGMENT FOR FRAUD.** A judgment recovered in an action upon a judgment, can not be collaterally assailed upon the ground that the last mentioned judgment was fraudulently obtained. *Owens v. City of South Omaha*..... 466
3. **Consent of Parties as to Time of Rendering: STATUTES.** A suit, in which there were attachment and garnishment proceedings, was tried to the court without the intervention of a jury. The parties being present at the conclusion of the argument and at the time of the final submission of the case, consented and agreed, upon the request of the justice, that he should take the case under advisement and render his judgment within four days as defined in the statute. On the third day thereafter, both parties being in court, judgment was rendered. *Held*, That the justice need not, in such case, render his judgment instantly; and that if the judgment was rendered within the time agreed upon by the parties, and defined in section 1002 of the Code, such judgment was not void for want of jurisdiction. *Reed v. Mott*.. 450
4. **Demurrer, Effect of.** A demurrer searches the entire record, and judgment must go against him whose pleading was first defective in substance. *Brown v. Houghton*..... 425
5. **Equitable Relief: PLEADING: EVIDENCE: NOTICE.** Equity will not relieve against a judgment at law unless the complainant both pleads and proves a defense thereto upon the merits, nor in any case in which he has had knowledge or notice of the pendency of the action in time to make his defense therein, and has negligently omitted so to do. *Dorwart v. Troyer* ..... 22
6. **Findings: MODIFICATION.** Where the findings show a narrower liability than that enforced by the judgment of the court, or show no liability and the judgment enforces one, or in any other way a discrepancy between findings and judgment is presented which no possible state of the plead-



**JUDGMENT—Continued.**

ings could justify, modification or reversal may be had upon a record showing such findings and judgment only.

*Shelby v. Creighton* ..... 264

7. ———: ———. But where the ground of complaint is that the findings of themselves would entitle the plaintiff in error to more relief than was granted, a record containing the findings and judgment only is insufficient to procure modification or reversal, since the prayer of the petition may have been more limited than the relief warranted by the facts alleged and found. *Idem*.
8. **Impeaching Validity by Affidavits: NO OBJECTION BELOW: APPEAL.** Where evidence of facts tending to impeach the validity of a judgment is presented to the trial court by affidavits, and no objection is made in the court below to the consideration of the affidavits because the judgment creditor has not had an opportunity to cross-examine witnesses, it is too late to interpose this objection after the case has been removed to this court upon appeal. *Baldwin v. Burt* ..... 383
9. **Liens: HOMESTEAD: EXEMPTIONS.** *Duell v. Potter*, 51 Neb., 241, followed in a case of the same nature. *Hannah v. Perkins* ..... 614
10. **Municipal Corporation: CONCLUSIVENESS.** A judgment against a municipal corporation is equally conclusive upon the city and its taxpayers. *Owens v. City of South Omaha*.. 466
11. **Pleading: DEFAULT: EFFECT.** A default, by a party properly served, is a confession only of such facts as are properly pleaded in the petition. *Carnahan v. Brewster*..... 366
12. **Rendered on Answer Day: WAIVER: COLLATERAL ATTACK.** While it is irregular and erroneous to render judgment on answer day, such irregularity may be waived by not taking advantage thereof, and a judgment so rendered is not open to collateral attack. *Bokhoof v. Stewart*..... 714
13. **Res Judicata.** The doctrine of *res judicata* applies only to final judgments, not to interlocutory judgments or orders, which the court may vacate or modify upon a further hearing. *Smith v. Smith* ..... 655
14. **Supersedeas: TRANSCRIPT, NECESSITY FOR: STATUTES.** In order to supersede a judgment under sections 588 and 590, Code of Civil Procedure, a transcript as well as a petition in error must be filed in the supreme court. *Morton v. Western Seed & Irrigation Co.* ..... 131
15. **Vacation: APPLICATION OF STATUTES.** The third subdivision of section 602, Code of Civil Procedure, applies only to voidable judgments which are proof against collateral attack and not to such as are absolutely void. *Baldwin v. Burt*..... 377

**JUDGMENT—Concluded.**

16. ———: ———. The provisions of section 602, Code of Civil Procedure, apply to voidable and not to void judgments. *Idem* ..... 383
17. Void: ENFORCEMENT: RESISTANCE WITHOUT MERITORIOUS DEFENSE. Where the plaintiff is seeking affirmatively to enforce a void judgment, one who merely resists is not governed by the rule requiring a party seeking relief against such a judgment to show a meritorious defense. *Idem*.... 377

**JUDICIAL NOTICE.** See COURTS, 4. EVIDENCE, 7.

**JUDICIAL SALES.** See APPEAL AND ERROR, 76-79. MORTGAGES.

1. Appraisal: COPY: PURPOSE: CLERICAL DEFECT. Copy of appraisal is filed to serve as a guide for bidders and parties at the sale and a mere clerical defect will not vitiate a substantially correct copy. *Emory v. Boyer*..... 1
2. ———: FILING COPY BEFORE SALE: STATUTES. The provisions of section 491d of the Code of Civil Procedure, to the effect that a copy of the appraisement of real estate to be sold at judicial sale, inclusive of the applications to certain officers for certificates of liens and such certificates, shall be forthwith deposited in the office of the clerk of the proper court, are mandatory, and unless there is a compliance therewith prior to the advertisement of the notice of sale, any sale made may be vacated. *Globe Loan & Trust Company v. Wood*, 58 Neb., 395, followed. *Chadron Loan & Building Ass'n v. O'Linn* ..... 246
3. ———: FILING COPY: COMPLIANCE WITH STATUTE. When a copy of the appraisal of real estate is filed in the office of the clerk of the district court, before the land is advertised for sale, and has attached thereto the applications for and certificates of liens, the filing mark being placed on the copy of the appraisal alone, there has been a substantial compliance with the requirements of section 491d of the Code. *Armington v. Maben* ..... 416
4. ———: FRAUD: VALUE. Where the sole evidence in support of a motion to vacate an appraisement of real property for judicial sale on the ground of fraud relates to the value of the property, such appraisement will not be set aside unless it is so clearly shown to be grossly inadequate as to compel the conclusion that it is fraudulent. *Omaha Loan & Trust Co. v. Walenz* ..... 806  
*Omaha Savings Bank v. Tracy* ..... 411
5. ———: OBJECTIONS. Where the record and the evidence shows that the appraisers were qualified and possessed the requisite knowledge of the value of the real estate described in the order of sale, it is not necessary that the appraise-

**JUDICIAL SALES—Continued.**

- ment be made in actual view of the premises. *Reynolds v. Fagan* ..... 415
6. ———: ———: WHEN MADE. Objections to an appraisal of real estate on a judicial sale come too late if made only after the sale has been made. *Emory v. Boyer*..... 1
7. ———: SECOND OFFER FOR SALE. An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether sold under the original, or an alias writ. *Burkett v. Clark*, 46 Neb., 466. *Lombard v. Pasusta* ..... 496
8. Appraiser, Objection to: WAIVER. Where an appraiser called by the sheriff to appraise real estate ordered sold under a decree of foreclosure is disqualified to act, and such disqualification is known to the defendant at or prior to the appraisement, he can not lie still until after the sale is made and urge such disqualification as an objection to the confirmation of the sale. *Union Central Life Ins. Co. v. Baker* ..... 57
9. Confirmation: APPEAL FROM: AFFIRMED. *Ellsworth v. Tooker* ..... 515
10. ———: OBJECTIONS: INSUFFICIENT. Objections made to the confirmation of a sale examined, and held insufficient. *Peterboro Savings Bank v. Johnson*..... 788
11. ———: ———: WHEN MADE. Objections to confirmation of a sale except for fraud will not be considered where they go to the appraisement only and were not raised before sale. *Gray v. Eurich* ..... 194
12. ———: ———: ———. Objections to confirmation of a sale will not be considered except for fraud where they go to the appraisement only and were not raised before sale. *Gray v. Eurich*, ante, page 194, followed. *Gray v. Naiman*.. 196
13. Mortgages: AFFIRMED. *Omaha Loan & Trust Co. v. McCumber* ..... 787
14. Place Where Held: OBJECTIONS. The sale having been made at the door of the court house, an objection that it was not made in the court room, or at the door of the court room, the room in the court house where the decree was rendered, is untenable. *Reynolds v. Fagan*..... 415
15. Reversal of Judgment: RESTITUTION, WHO MAY DEMAND. Where a judgment creditor purchases property at an execution sale on a judgment which is subsequently reversed, it is his duty to make restitution of the property, so purchased, to the judgment debtor after the reversal of the judgment; but the right to demand restitution is confined to the judgment debtor or his privies and can not be invoked by an at-

**JUDICIAL SALES—Concluded.**

taching creditor of such judgment debtor. *Nelson v. City of Beatrice* ..... 47

16. **Sheriff's Return: IMPEACHMENT: EVIDENCE.** One who attacks the appraisal of real estate, because it is claimed that one of the appraisers was not a freeholder, must establish such fact by a preponderance of the evidence, in order to overcome the certificate of the sheriff that the appraisers were both freeholders. *Lombard v. Pasusta*..... 496

**JURISDICTION.** See **APPEAL AND ERROR**, 80, 81. **COURTS**, 5. **FORCIBLE ENTRY AND DETAINER**, 3. **JURY. JUSTICES OF THE PEACE.** **MORTGAGES**, 34, 50. **WRIT OF ASSISTANCE**, 1.

**JURY.** See **TRIAL**, 3, 12.

**Jurisdiction: VOLUNTARY APPEARANCE: CONTINUANCE.** The return day of the summons was September 5. It was returned not served because the defendant was a non-resident of the state, and not found within the county. On October 16, defendant entered his voluntary appearance in the case, waiving issuance and service of summons. *Held*, That the date of such appearance was equivalent to the return day of the summons; that a continuance for less than ninety days from October 16 but more than ninety days from September 5, without defendant's consent, did not work a discontinuance of the suit. *Reed v. Mott* ..... 450

**LACHES.** See **QUIETING TITLE**, 1.

**LANDLORD AND TENANT.**

1. **Covenant in Lease: CHATTEL MORTGAGE ON CROPS: VALIDITY.** A covenant in an unrecorded lease for the term of five years at an annual rental payable annually, to the effect that the lessee shall on the 15th day of June in each year execute to the lessor a chattel mortgage on the growing crops, to secure the payment of the rent for that year, is void as to the creditors of the lessee. *Ryan v. Donley*..... 6
2. **Eviction: OBSTRUCTION OF ENTRANCE TO PREMISES.** The use of said door and hallway for the purposes of lessee's business being incident to the lease of the room, an obstruction thereof by the lessor so as to prevent use by the lessee and his customers is an eviction, which the lessee may treat as total or partial at his election. *Kitchen Bros. Hotel Co. v. Philbin* ..... 340
3. ———: **PARTIAL: COUNTER-CLAIM.** In case the lessee elects to treat the eviction as partial, he may maintain a counter-claim for damages upon the implied covenant for quiet enjoyment, when sued by the lessor on the covenant to pay rent. *Idem*.
4. ———: ———: **DAMAGES FOR GAINS PREVENTED.** A party

**LANDLORD AND TENANT—Continued.**

may recover for gains prevented where such damages are certain and are the natural result of the wrong complained of. *Idem.*

5. **Evidence Sufficient.** Evidence examined and found to sustain the verdict. *Boyd v. George*..... 420
6. **Heat With Building: NOT STIPULATED IN LEASE: CUSTOM: EVIDENCE.** Evidence by a number of real estate dealers and managers, in general terms, that a leasing of a room was by custom in the city of Lincoln understood to include an agreement of the lessor to furnish heat, when he maintained a heating plant in the building, where each witness acknowledged that in cases of written leases it was usual to incorporate an agreement as to the matter, and no instance of such heating by the lessor without a stipulation to that effect in the case of a written lease could be cited, *held* insufficient to uphold a verdict for defendant in an action to recover for furnishing such heat to a tenant whose written lease contained no such stipulation and who did not claim that any express agreement to furnish it was made. *McConnell v. Bettman & Co.* ..... 875
7. **Leases: COVENANT IMPLIED FROM.** A covenant for quiet enjoyment of the leased premises is implied from the demise. *Kitchen Bros. Hotel Co. v. Philbin*..... 340
8. ———: **MATTERS INCIDENT TO, INCLUDED THEREIN.** Where a room on the ground floor of a hotel building was leased to a ticket broker and it appeared that a large portion of his business came from patrons of the hotel who entered his office from the hotel rotunda, *held* that the lease included the use for the lessee's customers of a door and hallway leading from the rotunda to the room leased. *Idem.*
9. ———: **PRIORITY: EVIDENCE: DAMAGES.** Evidence examined, and *held* to show ample facts to sustain findings of trial court. *Blodgett v. Jensen*..... 543
10. ———: **TERMINATION OF.** Where the lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor takes possession himself, or accepts rent from another, such change of possession by mutual agreement operates as a surrender and termination of the lease. *Boyd v. George*..... 420
11. ———: **WHAT PASSES WITH.** A lease of a part of a building passes with it, as incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. *Kitchen Bros. Hotel Co. v. Philbin*..... 340
12. **Pleading: DAMAGES: SUFFICIENCY OF ALLEGATIONS.** Allegations in petition, 1st, of lease by plaintiff from defendant of lands as meadow; 2d, of actions brought successfully against

**LANDLORD AND TENANT—Concluded.**

plaintiff by a third party to recover for the grass taken from the land by plaintiff; 3d, of notice to this plaintiff in error of such actions and request to defend, and, 4th, of payment of judgments and costs in such actions by plaintiff, *held*, to show a cause of action. *Idem*.

**LAW OF THE CASE.** See APPEAL AND ERROR, 83, 84.

**LEX LOCI.** See INTOXICATING LIQUORS, 5.

**LIBEL AND SLANDER.**

1. **Evidence Sufficient.** Evidence examined, and *held* to sustain the verdict. *Schmuck v. Hill*..... 79
2. **Publication Sufficient.** While the sending of a libelous letter to the person defamed does not amount to publication thereof, where the sender so addresses it that in ordinary course it will reach a third person, and as a natural result it does reach and its contents become known to such third person, there is a sufficient publication. *Idem*.
3. ———. Hence where a libelous letter concerning plaintiff was sent by mail addressed to plaintiff's employer and plaintiff jointly, and delivered at her employer's shop, where it was found by plaintiff and turned over unopened to her employer, who read it, *held* that there was a publication. *Idem*.
4. **Publications Subsequent to First: LIABILITY.** One who puts a libel in circulation is liable for any subsequent publications which are the natural consequence of his act. *Idem*.

**LIENS.** See ATTACHMENT. ATTORNEY AND CLIENT. GUARANTY. JUDGMENT, 9. TAXATION, 12-14.

**LIMITATION.** See RAILROADS, 2, 5. TRIAL, 5.

**LIMITATION OF ACTIONS.** See EMINENT DOMAIN, 2. MECHANICS' LIENS. QUIETING TITLE, 2. TAXATION, 9.

1. **Absence from State: RESIDENCE: STATUTES.** Where a resident of this state against whom a cause of action has accrued removes his residence to another state, but continues his business here and comes to the state openly, notoriously and regularly each business day and there remains during working hours, he is not absent from the state within the meaning of section 20, Code of Civil Procedure, during the period in which he so comes thereto and remains therein. *Webster v. Citizens Bank of Omaha*..... 353
2. **Computation of Time.** In such case, in determining the period of his absence from the state within the meaning of said section, it is not proper to reckon the aggregate number of hours during which he is out of the state, but, where it appears that he came regularly to his office in the state each working day of the year except for a brief annual

**LIMITATION OF ACTIONS—Concluded.**

- vacation, if the aggregate of such vacations and of the days on which he did not come to his office does not extend the statutory period of limitation to or beyond the date of suit, the cause of action is barred. *Idem.*
3. **Fraudulent Conveyances: WANT OF KNOWLEDGE: PLEADING.** When an action is brought to set aside a fraudulent conveyance more than four years after the date of the conveyance, it is incumbent on the plaintiff to show himself within the exception that gives additional time, on account of the want of knowledge of the transaction, by stringent rules of pleading and evidence. *Westervelt v. Filter* ..... 731
  4. **Pleading Toll of the Statute.** The same stringent rule of pleading and proof is required to toll the statute for want of capacity to bring the action as is required to toll it for want of knowledge of the fraud. *Idem.*
  5. **Waiver.** Question of the statute of limitations, if not raised in any manner in the lower court, will be deemed waived and not considered here. *Omaha Carpet Co. v. Clapp*..... 406
  6. **When Begins to Run.** The statute of limitations does not begin to run until a right of action has accrued. *Brown v. Silver* ..... 164

**LIS PENDENS.** See CHATTEL MORTGAGES, 2.

**LOST INSTRUMENTS.**

- Lost Instruments: PLEADING MANNER OF LOSING.** In an action upon a lost instrument it is not necessary to allege the manner in which the instrument was lost. *Storey v. Kerr*..... 568

**MANDAMUS.**

1. **Against "Advertising" Fund: PLEADING: MONEY IN FUND: COUNTIES.** When an application for a writ of mandamus and the alternative writ to require the chairman of the county commissioners to sign a warrant drawn against an "advertising" fund contain no allegation of money in the treasury or tax levied, or appropriation, for such fund, they state no cause of action. *Patterson v. State* ..... 765
2. **Appeal and Error: ADEQUATE REMEDY AT LAW: STATUTES.** An ultimate right of review by error or appeal is a plain and adequate remedy within the purview of section 646, Code of Civil Procedure. *State v. Westover*..... 768
3. **Authority of Lower Court Upon Reversal of Decree.** Where upon appeal to this court the judgment of the trial court is reversed, and the cause remanded for further proceedings, the trial court has authority to take such further action in the interest of justice as the law will sanction and a sound discretion dictate or approve. *State v. District Court for Johnson County* ..... 885

**MANDAMUS—Concluded.**

4. Discretionary Power, Control of. This court will not, by mandamus, undertake to control the discretionary powers of another tribunal. *Idem.*
5. Vacation of Order Setting Aside Decree: APPEAL AND ERROR. As an order setting aside a decree and granting a new trial, made without jurisdiction, may be reviewed on error or appeal as soon as it results in a new decree, a writ of mandamus will not issue to compel vacation of such order and reinstatement of the original decree. *State v. Westover*, 768
6. When Will Lie. Mandamus will lie to control the action of the state printing board in awarding contracts for state printing to the lowest and best bidder. *Marsh v. State*.... 372

**MASTER AND SERVANT.**

Contract, Breach of: QUANTUM MERUIT. Where a party hires himself to another for a fixed period, and leaves the service before the expiration of his term, though without fault on the part of the employer, he may recover the value of the services as upon *quantum meruit*, less such damages as the employer may have sustained by the breach of the contract. *Murphy v. Sampson* ..... 297

**MECHANICS' LIENS.**

Limitation of Actions: PRESUMPTIONS. Where the items constituting a mechanic's lien show that more than four months have intervened between the dates of performing the service or furnishing the material it raises the presumption that the work was performed or the materials were furnished under separate contracts, but this presumption is overcome by proof that there was but one contract covering the whole. *Cornell v. Kime* ..... 478

**MELIORANDA.** See EVIDENCE, 9.

**MISCONDUCT.** See TRIAL, 13-15.

**MISTAKE.** See ACCOUNT STATED. COUNTIES, 1. EXECUTORS AND ADMINISTRATORS, 4. JUDICIAL SALES, 1. MORTGAGES, 17, 51. OFFICERS, 1-3.

**MORTGAGES.** See APPEAL AND ERROR, 15, 85. BUILDING AND LOAN ASSOCIATIONS, 11. EXCEPTIONS, BILL OF, 4. HOMESTEAD, 4. JUDICIAL SALES, 13. PRINCIPAL AND AGENT, 12, 13. TAXATION, 3, 18. USURY, 3. WILLS, 10. WRIT OF ASSISTANCE, 2.

1. Acknowledgment: DISQUALIFICATION OF OFFICER: PUBLIC POLICY. On the grounds of public policy an officer is disqualified from taking the acknowledgment of a mortgage given to secure an indebtedness, evidenced by a note, of which he is the real owner. *Hedblom v. Pierson*..... 799



**MORTGAGES—Continued.**

2. **Assignments: RELEASE: GOOD-FAITH PURCHASER.** Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee. *Whipple v. Fowler*, 41 Neb., 675. *Cheshire Provident Institution v. Gibson* ..... 392
3. ———: **SATISFACTION: NOTICE TO SUBSEQUENT MORTGAGEE OR PURCHASER.** A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized. *Whipple v. Fowler*, 41 Neb., 675, followed. *Columbia Nat. Bank v. Marshall*..... 790
4. **Foreclosure: "ACTION AT LAW": EVIDENCE INSUFFICIENT.** Evidence examined, and *held* insufficient to sustain a finding that no proceedings at law had been had for the recovery of the mortgage debt. *Massachusetts Mutual Life Ins. Co. v. Smith* ..... 628
5. ———: ———: **PLEADING: EVIDENCE.** Where there is some evidence tending to support the allegation of no proceedings at law in a foreclosure suit, and no counter-showing attempted, decree of foreclosure will be affirmed. *Brown v. Collins* ..... 149
6. ———: **AFFIDAVIT OF PUBLICATION FILED AFTER SALE: PREJUDICE.** A sheriff made a sale under a decree of foreclosure, and did not file with his return the affidavit of the publisher showing due publication of the notice of such sale until the day after it actually took place. *Held*, Not prejudicial to the rights of the mortgagor or owner of the land. *Nash v. Wilkinson* ..... 228
7. ———: **AFFIRMED.** *Baxter v. Schmitz*..... 591  
*Real Estate Trust Company of Philadelphia v. Fawell*..... 738  
*Gow v. Gahlon* ..... 819
8. ———: **APPEAL: SUPERSEDEAS.** A supersedeas bond given by the defendant in a foreclosure proceeding will not operate to stay a sale under the decree unless the defendant has perfected his appeal within the time required by statute. *Magruder v. Kittle* ..... 418
9. ———: **APPRAISAL: CONCLUSIVENESS.** The appraisers are by statute a summary tribunal to fix such price, and their action when duly taken under the statute can be impeached for fraud alone. *Pearson v. Badger Lumber Co.*..... 251

**MORTGAGES—Continued.**

10. ———: ———: **DEDUCTION OF LIENS.** The deduction of prior liens in appraising lands for judicial sale being for the benefit of the creditor, the owner of the lands is not prejudiced by failure to deduct liens and may not complain thereof. *Wright v. Patrick* ..... 695
11. ———: ———: **ERROR IN: EFFECT.** An error, in appraising real estate for judicial sale, whereby a deduction is made for liens that have been satisfied or merged in the decree, is error without prejudice, where the property sold for more than two-thirds its gross valuation. *Sanford v. Anderson*.. 315
12. ———: ———: **FILING COPY.** The filing with the clerk of the court of a substantially correct copy of appraisement of real estate for a judicial sale, is sufficient. *Northwestern College v. Schreck* ..... 484
13. ———: ———: ———: **"FORTHWITH": STATUTES.** "Forthwith," as used in section 491d of the Code of Civil Procedure, means as soon as with reasonable dispatch in the ordinary course of business it can be done. *Hubbard v. Hennessey*.. 816
14. ———: ———: ———: **TIME OF: SHERIFF'S RETURN.** The fact that the copy of the appraisement was not filed until the fourth day following the one on which it was made, does not of itself show that the sheriff's return that he filed it "forthwith" is incorrect. *Idem*.
15. ———: ———: **FRAUD: EVIDENCE.** Evidence examined, and held to show that the appraisement of the property was not so low as to raise a presumption of fraud, and, further, to be insufficient to show that the appraisers were not disinterested freeholders. *Stafford v. Harmon*..... 528
16. ———: ———: ———: **PRESUMPTION: VALUE.** An appraisement objected to on the ground that it is fraudulent, where no actual fraud is shown, must be supported by evidence as to value, between which and the appraised value the discrepancy is so great as to raise a presumption of fraud; otherwise the objection can not be sustained. *Jones v. Cleary* ..... 541
17. ———: ———: **MISTAKE IN VALUATION.** An appraisement of real estate for the purposes of judicial sale, duly made, can not be assailed on the sole ground that the appraisers were mistaken in their valuation of the property. *Taylor v. Reis*, 533
18. ———: ———: **OBJECTIONS.** "An appraisement duly made of real estate for the purpose of a judicial sale can not be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisement it must be challenged for fraud." *Brown v. Fitzpatrick*, 56 Neb., 61. *National Life Ins. Co. v. Crandall*..... 335

**MORTGAGES—Continued.**

19. ———: ———: ———. Objections to the appraisalment of real estate for the purpose of judicial sale examined and held, under the record, not well founded. *Dartmouth Savings Bank v. Foley* ..... 459
20. ———: ———: ———. Objections to an appraisalment of real estate, offered for sale under a decree of foreclosure, to be available must be made before sale. *Simpson v. Snook*, 412  
*Sanford v. Anderson* ..... 315  
*Stein v. Parrotte* ..... 351  
*McKinney v. Glassburn* ..... 615  
*Potter v. Lynch* ..... 798  
*Roberts v. Rouse* ..... 669
21. ———: ———: PURPOSE. The purpose of an appraisalment of real estate for judicial sale is to fix a price below two-thirds of which no bids will be received. *Pearson v. Badger Lumber Co.* ..... 251
22. ———: ———: SECOND SALE. Where the first judicial sale is set aside it is the duty of the sheriff to proceed to sell without a new appraisalment, unless such appraisalment has been set aside, and an order of the court directing him to sell on such appraisalment, though unnecessary, is not error. *McKinney v. Glassburn* ..... 615
23. ———: ———: VALUATION: FRAUD. Where an appraisalment of real estate has been duly made for the purpose of judicial sale, it can not be successfully attacked solely on the ground that the property has been appraised too low. To use the low valuation as a successful basis for attacking the appraisalment, it must be alleged and proved that it was fraudulent. *Brown v. Fitzpatrick*, 56 Neb., 61. *Idem.*
24. ———: ———: ———: ———. An appraisalment duly made of real estate for the purposes of a judicial sale can not be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisalment it must be challenged for fraud. *Brown v. Fitzpatrick*, 56 Neb., 61. *Hubbard v. Hennessey* ..... 816
25. ———: CERTIFICATES OF LIENS: FROM TREASURER: PRESUMPTION. Where the treasurer, upon due application by the sheriff, furnishes two certificates of the amount of taxes due upon the lands to be sold, the later certificate will be presumed to be correct. *Wright v. Patrick*..... 695
26. ———: ———: PRESUMPTION AS TO TIME OF FILING. Where the record is silent as to the time of filing copies of the certificates of liens, it will be presumed that they were duly and regularly filed. *Clark v. Wolf*..... 290

**MORTGAGES—Continued.**

27. ———: CONFIRMATION: APPEAL FROM: AFFIRMATIVE ERROR. To require the reversal of an order confirming a sale of property under a decree of foreclosure, error must affirmatively appear from the record. *Stafford v. Harmon*..... 528
28. ———: ———: ———: APPRAISAL OF DEFENDANT'S INTEREST. A defendant appealing from an order confirming a judicial sale of land can not be heard to complain that his interest was not singled out for appraisement, where the appraisement was of the total value and also the appraisement of the "defendant's interest." *Ramser v. Johnson*.... 526
29. ———: ———: ENTRY OF ORDER. Where an order is entered on the records of the court and a party appeals therefrom, it will not be reversed on the ground that it does not affirmatively appear that the judge directed the clerk to make such entry. *Hartsuff v. Huss*..... 145
30. ———: ———: OBJECTIONS. It is not a valid objection to the confirmation of a sale of real estate under a decree of foreclosure that such sale was made more than sixty days after the issuance of the order of sale. *Burkett v. Clark*, 46 Neb., 466, overruled, to the extent that it conflicts with the foregoing. *Idem*.
31. ———: ———: ———: ASSAILING DECREE. A party will not be permitted to assail the regularity of a decree of foreclosure by objections to confirmation of a sale made thereunder. *Stein v. Parrotte* ..... 351
32. ———: ———: ———: TIME FOR MAKING. Objections to the confirmation of a judicial sale made and filed after the sale has been confirmed will not be considered. The proper practice in such cases is by motion to vacate and set aside the sale. *Gillespie v. Morsman*..... 162
33. ———: ———: REGULARITY PRESUMED. Regularity of the trial court in passing upon a motion to confirm a sale will be presumed until overcome by affirmative proof in the record. *Jones v. Cleary* ..... 541
34. ———: ———: SALE AT CHAMBERS: JURISDICTION. A judge at chambers has jurisdiction to pass on all objections to the regularity of such sale, including objections to the appraisement, and in making the order of confirmation he impliedly overrules all such objections. *Hartsuff v. Huss*..... 145
35. ———: ———: TIME ORDER OF SALE ISSUED. A mortgagor in a foreclosure proceeding can not object to the confirmation of sale because the order of sale was issued before the priorities of the different lienors had been determined, as he has no rights involved in this question. *Rutland Savings Bank v. Pargeter* ..... 518  
*Rutland Savings Bank v. O'Bryan*..... 519

**MORTGAGES—Continued.**

36. ———: DEBTOR AND CREDITOR: OVERDILIGENCE OF DEBTOR. A debtor should not ordinarily be punished for overdiligence in meeting his honest obligations. *Union Stock Yards Nat. Bank v. Haskell*..... 839
37. ———: DEFICIENCY: CONSENT TO STAY: RELEASE OF SURETY. An extension of the time of payment by agreement between the creditor and his debtor, based upon a consideration, will release the guarantor, unless he consents to such extension. *Rushton v. Dierks Lumber Co.* ..... 563
38. ———: ———: STATUTES, REPEAL OF. The repeal of section 847, and a portion of 848, and of 849 of the Code of Civil Procedure, commonly known as the deficiency judgment law, in no manner affected the rights or remedies existing in an action, which had been commenced or which were incident to a cause of action which had accrued and was existing at the time of the taking effect of such repeal. *Brayton v. Oaks* ..... 593
39. ———: ———: ———. The act of 1897, repealing sections 847 and 849 of the Code of Civil Procedure, commonly known as the deficiency judgment law, does not affect the plaintiff's right to have a deficiency judgment entered in a foreclosure suit, on a cause of action accruing prior to, and existing at the time of, such repeal. *Merrill v. Miller*..... 630
40. ———: ———: ———: ACTIONS PENDING. The repeal of sections 847 and 849 of the Code of Civil Procedure (chapter 95, Session Laws, 1897), permitting the recovery of deficiency judgments, did not affect actions then pending. *Hanscom v. Meyer*, 60 Neb., 68, 86 N. W. Rep., 381, followed. *Rushton v. Dierks Lumber Co.* ..... 563
41. ———: ———: ———: COURT MAY AUTHORIZE ACTION AT LAW. Such repeal does not deprive the court of the right to authorize the prosecution of an action at law, on the note, to recover a judgment for a deficiency, after foreclosure proceedings, where the right of action had accrued and existed at the time the repealing act took effect. *Idem*.
42. ———: ———: WHEN RENDERED: STATUTES. Under section 847 of the Code of Civil Procedure, as it existed before its repeal, a deficiency judgment could not be rendered until the mortgaged property had been exhausted by sale and confirmation thereof. *Carnahan v. Brewster* ..... 366
43. ———: EQUITY, SETTING ASIDE A SALE IN. Fixing a price by the appraisers does not deprive the court of any of its equity power to set aside a sale or to require that such sale be for an adequate price. *Pearson v. Badger Lumber Co.*... 251
44. ———: EVIDENCE OF "ACTION AT LAW" SUFFICIENT. Evidence

**MORTGAGES—Continued.**

- of attorney, in whose hands note and mortgage have been since maturity, that no proceedings at law have been had on them in county where property is situated and where defendants were served with summons, and none elsewhere to his knowledge, is sufficient, in absence of all contradiction, to support in this respect a decree for plaintiff. *Luce v. Sorensen* ..... 760
45. ———: EVIDENCE SUFFICIENT. Evidence examined and held sufficient to sustain the judgment. *Stewart & Co. v. Allen*.. 333
46. ———: ———. Evidence examined, and held sufficient to sustain the findings of the trial court. *Smith v. Smith*..... 655
47. ———: EXTENSION AGREEMENT NOT PLEADED. An extension agreement, which is not pleaded and as to which there is no definite evidence, held properly disregarded. *Luce v. Sorensen* ..... 760
48. ———: IRREGULARITIES: NO INJURY CLAIMED. A sale of real estate upon a decree of foreclosure should not be set aside for mere irregularities, where no claim is made that the complaining party has been injured thereby. *Jones v. Miller* ..... 582
49. ———: JUDGMENT AT LAW AFTER DECREE AND REPEAL OF STATUTE. An action at law can not be maintained, to recover a judgment for any portion of the mortgage debt after a decree of foreclosure where the action to foreclose the mortgage had been commenced, or the cause of action therefor had accrued and was existing, at the time of the repeal of the law commonly known as the deficiency judgment law, without an order of the court, authorizing the prosecution thereof. *Brayton v. Oaks* ..... 593
50. ———: JURISDICTION. On the facts stated, held, the trial court had jurisdiction to enter the decree assailed. *Sanford v. Anderson* ..... 315
51. ———: MISTAKE OF DATE OF DECREE IN ORDER OF SALE. Objection that order of sale recited a wrong date of decree held immaterial. *Colony v. Billingsley* ..... 670
52. ———: NOTICE OF SALE. There is no requirement of the statute that the notice of sale under a decree of foreclosure shall contain a statement that the sale is to be made under a decree of foreclosure. *Ramser v. Johnson*..... 526
53. ———: ORDER OF SALE OR COPY OF DECREE AS AUTHORITY TO MAKE SALE. A decree of foreclosure is the authority of the officer to proceed to sell the property in satisfaction of such decree, and neither an order of sale nor a copy of the decree in his hands is essential for the exercise of such authority. *McKinney v. Glassburn* ..... 615

**MORTGAGES—Continued.**

54. ———: **PARTY IN INTEREST: LEGAL CAPACITY TO SUE: EVIDENCE INSUFFICIENT.** Evidence examined, and *held* insufficient to sustain the judgment of the trial court. *Michigan Mutual Life Ins. Co. v. Klatt*..... 870
55. ———: **PLEADING: "ACTION AT LAW."** That no proceedings at law have been had for the recovery of the debt, is a material allegation in a petition for the foreclosure of a mortgage, and if put in issue it must be established by proof. *Holt v. Rust-Owen Lumber Co*..... 170
56. ———: ———: ———. That no proceedings at law have been had for the recovery of the debt secured by the mortgage, is a material allegation in a petition for the foreclosure of a mortgage and when put in issue must be proved. *Alling v. Woodard* ..... 235
57. ———: ———: ———: **BURDEN OF PROOF.** In a suit to foreclose a real estate mortgage in which a general denial is filed the burden is upon plaintiff to make a *prima facie* showing that no action at law has been instituted for the collection of the debt. *Hedblom v. Pierson*..... 799
58. ———: ———: ———: **EVIDENCE.** In a suit to foreclose a real estate mortgage, the petition must allege whether any proceedings at law have been had for the recovery of the debt or any part thereof, and when the answer is a general denial, there can be no recovery in the absence of proof sustaining such allegation of the petition. *Jones v. Burtis*, 57 Neb., 604, followed. *Drury v. Roberts*..... 574
59. ———: ———: **CASE DISTINGUISHED.** The case of *Grant v. Clarke*, 58 Neb., 72, distinguished. *Michigan Mutual Life Ins. Co. v. Klatt* ..... 872
60. ———: **PUBLICATION OF NOTICE OF SALE.** Publication of notice of sale in each issue of a semi-weekly paper for thirty days is a sufficient compliance with the statutory requirements in that respect. *Potter v. Lynch*..... 798
61. ———: **RETURN OF ORDER WITHIN SIXTY DAYS.** Failure of the sheriff to return an order of sale pursuant to decree of foreclosure within sixty days of its issuance is no sufficient reason for withholding confirmation of a sale made thereunder. *Taylor v. Reis* ..... 533
62. ———: **RIGHTS OF SECOND MORTGAGEE NOT A PARTY.** G. held a first mortgage and D. and F. a second mortgage on certain town lots. G. foreclosed his mortgage, but failed to make D. and F. parties to the action. Prior to any sale under the decree of foreclosure D. and F. procured a conveyance of the lots from the owner in full satisfaction of their mortgage and went into possession. They also entered into a

**MORTGAGES—Continued.**

- verbal agreement with G. by the terms of which they were to pay him, on a certain specified date in the future, the full amount of his decree, together with costs of the action and the attorney's fee therein incurred, and to make a deed to G. conveying to him the lots as security for the performance of the agreement on their part, G. to reconvey to them when payment was made. *Held*, That D. and F., not being made parties to the action of foreclosure instituted by G., had a legal right to redeem from his mortgage by paying the amount of his decree, and that the agreement above set out was simply an agreement to give D. and F. the right to redeem on the terms therein mentioned without an action brought for that purpose and that it could be enforced although not in writing. The defendant in his answer having admitted the agreement as claimed by the plaintiffs, has waived the statute even if the contract was obnoxious thereto. *Connor v. Hingtgen*, 19 Neb., 472. *Davis v. Greenwood* ..... 317
63. ———: SALE IN GROSS: PRESUMPTIONS. Selling 200 acres of land in gross, where it is one farm occupied as a whole by a single defendant, will not be presumed erroneous. *Potter v. Lynch* ..... 798
64. ———: SHERIFF'S RETURN: MATERIALITY OF PUBLISHER'S AFFIDAVIT. Where the sheriff's return of a sale shows a sufficient notice and is not denied, the fact that the printer's affidavit was made before notice was complete and fails to state fully the facts as to a legal publication, is not material. *Northwestern College v. Schreck*..... 484
65. ———: ———: TIME OF FILING COPY OF APPRAISAL. The fact that a copy of appraisement was not filed until the day following the one on which it was made does not of itself show that the sheriff's return, that he filed it forthwith, is incorrect. *Idem*.
66. ———: SWEARING APPRAISERS BY DEPUTY. A certificate that appraisers were sworn by the sheriff by a deputy, *held*, to sufficiently indicate that the deputy performed such services. *National Life Ins. Co. v. Crandall*..... 335
67. ———: TIME OF HOLDING SALE: NOTICE: PREJUDICE. Objection that sale was by standard time and no mention made of that fact in notice *held* to show no ground for setting aside sale where no prejudice appears and sale was held open one hour. *Colony v. Billingsley*..... 670
68. Interest: PLEADING INSUFFICIENT. Petition examined, and *held* that the demurrer thereto was properly sustained. *Hansen v. Mortensen* ..... 229



**MORTGAGES—Concluded.**

69. **Payment: EVIDENCE SUFFICIENT.** The evidence examined, and *held* sufficient to sustain the decree of the trial court. *Boyd v. Pape* ..... 859
70. ———: **TO AGENT SUFFICIENT: CANCELLATION.** When the money for the payment of a note secured by mortgage has reached the hands of an agent authorized to collect it, the debt is paid, and the mortgagor is entitled to have the mortgage, given to secure the debt, canceled. *Idem.*
71. **Right to Release Disputed: LIABILITY OF MORTGAGEE.** A mortgagee is not liable for a failure or refusal to release a mortgage, when the right of the person demanding such release is a disputed question. *Sullivan Savings Institution v. Sharp* ..... 300

**MUNICIPAL CORPORATIONS. See JUDGMENT, 10.**

1. **Notice: PRESUMPTIONS: INSTRUCTIONS.** Instructions as a whole *held* to properly submit the question of presumption of notice of defects in sidewalk. *City of Lincoln v. Mays*.. 204
2. ———: **TO WHAT PERSONS.** Instruction that notice to “any of the municipal authorities” was sufficient, and not prejudicial, where no evidence was introduced or tendered of notice to any but the street commissioner and the sidewalk inspector, and jury were cautioned to find no notice except as shown by the evidence. *Idem.*
3. **Personal Injuries: NOTICE: DESCRIPTION: STATUTES.** Notice that an injury occurred on the sidewalk along the east side of block 54, between two named streets, is, in the absence of any demand for more definite location, a sufficient location of the place in a notice to the city under section 36, article 1 of chapter 13a, Compiled Statutes, 1897. *Idem.*
4. ———: **PRESUMPTIONS: EVIDENCE.** Evidence *held* sufficient to warrant submission to the jury of questions whether the defects in the sidewalk were so obvious and of so long continuance as to warrant presumption of notice. *Idem.*
5. **Street Paving: CURBING AND GUTTERING: Cost.** Under the act of 1887, when the city has ordered a street paved, it may curb and gutter the same and make the expense thereof a legal charge upon the abutting real estate. *Orr v. City of Omaha* ..... 771
6. ———: **WITH AND WITHOUT PETITION: Cost.** The act of 1887 incorporating metropolitan cities authorized any such city to pave any street, alley or avenue within its limits either with or without a petition of the property owners representing a majority of the feet-frontage abutting on such street, alley or avenue; but without such petition the city could not make the cost of the paving a charge against the abutting property. *Idem.*

**NEGLIGENCE.** See **CONTRACTS**, 3. **FIRES**, 2.

**NEW TRIAL.** See **APPEAL AND ERROR**, 8, 49, 80, 86-88.

**Motion for: COURTS: ACTION BY JUDGE OTHER THAN ONE WHO TRIED CASE.** A court presided over by the successor of a deceased judge has authority to grant or deny a motion for a new trial in a case tried by the deceased while in office.

*Union P. R. Co. v. Lotway*..... 348

**NOTICE.** See **BILLS AND NOTES**, 5. **CHATTEL MORTGAGES**, 3. **CORPORATIONS**, 3, 4. **COUNTIES**, 4. **JUDGMENT**, 5. **MORTGAGES**, 52, 60, 67. **MUNICIPAL CORPORATIONS**, 1-4. **PRINCIPAL AND AGENT**, 8. **QUIETING TITLE**, 4. **RECEIVER**, 2.

**NUNC PRO TUNC.** See **COURTS**, 6.

**OCCUPATION.** See **EMINENT DOMAIN**, 2. **HOMESTEAD**, 3, 5.

#### **OFFICERS.**

1. **County Clerk: APPORTIONING RAILROAD PROPERTY: LIABILITY FOR MISTAKE: STATUTES.** The duty imposed upon the county clerk by section 85, article 1, chapter 77, Compiled Statutes, of apportioning railroad property among the several school districts for purposes of taxation is one owing to the public only; hence a county clerk is not personally liable to a school district for an honest mistake in the apportionment. *School District v. Burress*..... 554
2. ———: **LEVYING TAX A PUBLIC DUTY: MISTAKE: STATUTES.** The like duty imposed upon the county clerk by section 77, article 1, chapter 77, Compiled Statutes, is one owing to the public only; hence a county clerk who by mistake omits to levy the tax reported in accordance with said section is not personally liable to the school district. *Idem.*
3. **County Commissioners: LEVYING TAX A PUBLIC DUTY: MISTAKE: STATUTES.** The duty imposed upon county commissioners under section 11, subdivision 2, chapter 79, Compiled Statutes, of levying the tax voted by a school district meeting and certified by the district board is one owing to the public only, and county commissioners who in good faith but by mistake levy a less tax than that voted are not personally liable to the school district. *Idem.*
4. **Duty to Public: ACTION BY INDIVIDUAL.** An individual has no right of action against a public officer for breach of a duty owing to the public only, even though such individual is specially injured thereby. *Idem.*
5. **Duty to Public and Individual: RIGHT OF INDIVIDUAL: MEASURE OF DAMAGES.** Where the duty of levying a tax is owing to some individual, as well as to the public, as in cases where the levy is directed by a court of competent jurisdiction for payment of a judgment, the measure of dam-

**OFFICERS—Concluded.**

age is not the amount of the tax which should have been raised, but only such actual damages as the individual entitled to recover has sustained, such as the expense incident to procuring the tax to be raised and any impairment of his claim by reason of failure to levy. *Idem.*

6. **Presumption as to Duty.** It is the presumption of law that all officials have done their duty until the contrary is shown.

*Brown v. Helsley* ..... 69

**PARTIES.** See APPEAL AND ERROR, 10, 92. APPEARANCE. BANKS AND BANKING, 1. BILLS AND NOTES, 9. CORPORATIONS, 2. EVIDENCE, 14. MORTGAGES, 54, 62. RECEIVER, 2. TRIAL, 18. WITNESSES, 5.

**PARTITION.**

**Sales: EXEMPTION OF PROCEEDS.** Proceeds of a partition sale of real estate cannot be claimed as exempt personal property against one who had and has taken proper steps in the partition proceedings to enforce a judgment lien against the land partitioned. *First Nat. Bank of Albion v. Snyder*..... 136

**PARTNERSHIP.** See SET-OFF AND COUNTER-CLAIM.

**Liability of Partner: SUBMISSION TO JURY: EVIDENCE.** Evidence examined, and *held* sufficient to require submission to the jury of questions of liability on the part of defendant in error, as partner, in the purchase of the goods for whose price the action was brought; and action of trial court in instructing for verdict for defendant therefore erroneous. *Swofford Bros. Dry Goods Co. v. Cowgill*..... 254

**PAYMENT.** See BANKS AND BANKING, 4, 5, 8. BILLS AND NOTES, 6. BUILDING AND LOAN ASSOCIATIONS, 5, 8. CONTRACTS, 12. GARNISHMENT, 4. MORTGAGES, 69, 70. PLEADING, 11, 12. PRINCIPAL AND AGENT, 7, 14, 15.

**PENALTY.** See SHERIFFS AND CONSTABLES, 3. USURY, 4.

**PERSONAL INJURIES.** See DAMAGES, 5, 6. MUNICIPAL CORPORATIONS, 3, 4. RAILROADS, 1, 3, 4.

**PLEADING.** See APPEAL AND ERROR, 93-95. BANKS AND BANKING, 8. CONTRACTS, 16, 19. DAMAGES, 7. ESTOPPEL, 1. HUSBAND AND WIFE, 1. JUDGMENT, 4, 5, 11. LANDLORD AND TENANT, 12. LIMITATION OF ACTIONS, 3, 4. LOST INSTRUMENT. MANDAMUS, 1. MORTGAGES, 5, 47, 55-59, 68. RECEIVER, 3, 4. REPLEVIN, 2, 3, 10, 11. TAXATION, 10. TRIAL, 6, 7. USURY, 3, 5, 6.

1. **Amending to Conform to Proof.** It is not error by a district court to deny an application for leave to amend a petition to conform to the facts proved in a case in which he finds,

**PLEADING—Continued.**

- from sufficient evidence, that the facts sought to be pleaded have not been proved. *Dufrene v. Anderson*..... 813
2. **Answer Filed Out of Time: STRIKING FROM FILES: PREJUDICE.** Striking an answer from the files because filed out of time, where it was filed before the third Monday after fifty days from the judgment appealed from, is error without prejudice where defendant has no standing in court and no right to insist on any defense. *Jenkins v. Myatt*..... 718
3. **Construction After Judgment.** When a petition is not assailed until after judgment, it will be liberally construed so as to be sustained, if possible. *Brown v. Helsley*..... 69  
*Marsh v. State* ..... 372
4. **Contracts: ALLEGATION OF PERFORMANCE.** A petition, based on a contract which fails to allege performance on the part of the plaintiff, or facts showing a valid excuse for non-performance, is fatally defective. *Deering & Co. v. Claypool*, 520
5. **Corporate Capacity.** At common law a corporation may sue and be sued in its corporate name without an averment of its corporate capacity, and the provisions of our Code have not changed the common law rule in that regard. *Loan & Trust Savings Bank v. Stoddard* ..... 486
6. **Demurrer to Answer Overruled: DISMISSAL UPON FAILURE TO PLEAD.** In an action for an accounting, wherein the answer in addition to a general denial pleads a final settlement between the parties, and plaintiff demurs to such answer on the ground that it does not state facts sufficient to constitute a defense, and after an adverse ruling elects to stand on his demurrer, refusing to plead further, a judgment of dismissal by the trial court is proper. *Brown v. Houghton*... 425
7. **Denial of "Material Allegation": WAIVER.** A married woman held title to certain real estate and a judgment creditor of her husband filed a bill to subject the property to the payment of his judgment. The answer among other allegations contained the following: "Defendant denies every material allegation of the petition." *Held*, That as the plaintiff did not in any manner question the sufficiency of this answer in the district court he could not, on appeal, treat it as insufficient, or as confessing the allegations of the petition. *Doering v. Kohout* ..... 436, 438
8. **Denial Treated as Admission.** A denial of specified averments "as alleged in plaintiff's petition" will be treated as an admission thereof. *Storey v. Kerr*..... 568
9. **General Denial in Reply Sufficient.** A reply denying "each and every allegation of new matter" contained in the answer, while vulnerable to a motion for a more definite and

**PLEADING—Concluded.**

- certain denial, if not so assailed, is sufficient to put in issue the affirmative matters contained in the answer. *City of Crete v. Hendricks* ..... 847
10. **Material Fact: OMISSION: PRESUMPTION.** A material fact, if not alleged, is presumed not to exist. *Stillings v. Van Alstine* ..... 684
11. **Overpayment: SUFFICIENCY AFTER VERDICT.** Allegation that certain payments made at defendant's special instance and request as interest on a loan were in excess of the amount due, and made without any knowledge of that fact, sufficiently indicates a payment by mistake to support a verdict, rendered upon sufficient evidence, for the plaintiff. *Garrison v. Murphy* ..... 696
12. **Part Payment by Third Party: PETITION INSUFFICIENT.** The facts stated in the petition set out in the opinion, held, insufficient to constitute a cause of action. *Omaha Brewing Ass'n v. Tillenburg* ..... 280
13. **Reply, Failure to File: WAIVER BY TRIAL.** Where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat it so notwithstanding no reply appears in the record. *Loan & Trust Savings Bank v. Stoddard*..... 486
14. **Several Causes of Action: VERDICT UPON EACH: VALIDITY.** Where several causes of action are set up in the petition a separate verdict upon each is not improper. *Schmuck v. Hill* ..... 79

**POSSESSION.** See CHATTEL MORTGAGES, 4. REPLEVIN, 10, 12. TRESPASS.

**PRACTICE.** See EXCEPTIONS, BILL OF, 5.

**PREJUDICE.** See APPEAL AND ERROR, 57, 68, 69, 72, 77, 78. MORTGAGES, 6, 67. PLEADING, 2. REPLEVIN, 4. TRIAL, 13. WILLS, 9.

**PRESUMPTIONS.** See APPEAL AND ERROR, 51, 96. BILLS AND NOTES, 6. COURTS, 2, 5. EVIDENCE, 7. FRAUD. MECHANICS' LIENS. MORTGAGES, 25, 26, 33, 63. MUNICIPAL CORPORATIONS, 1, 4. OFFICERS, 6. PLEADING, 10. REPLEVIN, 9. USURY, 4.

**PRINCIPAL AND AGENT.** See GARNISHMENT, 1.

1. **Affirmed.** *Cheshire Provident Institution v. Bicknell*..... 770
2. **Reversed.** *Cheshire Provident Institution v. Courtney*..... 789
3. **Agency Established: EVIDENCE SUFFICIENT.** Evidence examined and held to support the findings of the trial court. *Harrison Nat. Bank of Cadiz v. Williams*..... 400
- Lebanon Savings Bank v. Blanke*..... 403

**PRINCIPAL AND AGENT—Continued.**

4. **Agent, Ostensible Authority of.** Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thompson v. Shelton*, 49 Neb., 644, and *Phoenix Insurance Co. v. Walter*, 51 Neb., 182, followed. *Harrison Nat. Bank of Cadiz v. Williams*..... 400  
*Lebanon Savings Bank v. Blanke*..... 403
5. **Bills and Notes: COLLECTION OF PRINCIPAL: AUTHORITY FOR.** The fact that the money to pay interest coupons has been paid to a person who sent the same to the original mortgagee at the place of payment; that it was sent to the owner of the note and mortgage, who returned the paid coupons to the mortgagee, who in turn sent them to the person to whom the money was paid, to be delivered to the mortgagor, is not sufficient ground to infer that such person has authority to collect the principal sum, where the evidences of indebtedness are not, and have not been, in his possession. *Lay v. Honey* ..... 749
6. ———: ———: **EVIDENCE OF AGENCY.** Evidence examined, and held not sufficient to show that F. was the agent of the pledgee of the note to collect the principal of the debt. *Connecticut Trust & Safe Deposit Co. v. Trumbo*..... 850
7. ———: **PAYMENT TO AGENT.** When payment is made to the agent of the holder of a negotiable promissory note and the authority of such agent to receive such payment is fully established by competent evidence, such payment is binding on the holder of the note, although the agent did not have the note in his possession at the time of such payment. *Union Stock Yards Nat. Bank v. Haskell*..... 839
8. **Knowledge by Agent: EFFECT ON PRINCIPAL.** Notice to or knowledge by an agent is imputed to his principal in those cases only in which it is his duty to act upon it, or to communicate it to his employer, in the proper discharge of his trust as such agent, and it possesses that character in those cases only in which it has a direct relation to the act or business which the agent is employed to do. *Hargardine, McKettrick Dry Goods Co. v. Krug*..... 52
9. **Estoppel of Principal.** Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the

**PRINCIPAL AND AGENT—Concluded.**

- agent's authority. *Holt v. Schneider*, 57 Neb., 523, followed.  
*Harrison Nat. Bank of Cadiz v. Williams*..... 400  
*Lebanon Savings Bank v. Blanke* ..... 403
10. **Evidence of Agency Insufficient.** Evidence examined and held not sufficient to show authority on the part of the person to whom the money was paid, to collect the same. *Lay v. Honey* ..... 749
11. **Evidence Insufficient: AUTHORITY OF AGENT TO COLLECT.** Evidence examined, and found insufficient to sustain the findings and judgment of the trial court. *Dewey v. Bradford* ..... 388
12. **Mortgages: AUTHORITY TO COLLECT FOR PRINCIPAL.** "The fact that a person, or company, is authorized to receive the installments of interest which become due on a mortgage, note or bond is not sufficient ground from which to infer that the authority also exists to collect or receive the principal sum, if the evidences of the indebtedness are not and have not been in the possession of such person or company." *Richards v. Waller*, 49 Neb., 639. *Idem*.
13. ———: **PAYMENT TO AGENT.** Payment of a mortgage debt to the agent of an undisclosed principal will extinguish the debt. *Cheshire Provident Institution v. Gibson*..... 392
14. **Payment of Note to Third Person: BURDEN OF PROOF OF AGENCY.** One who makes payment of a promissory note to a person, not the owner of the note, and not in possession of it, at a place other than the place of payment designated therein, assumes the burden of proving that the party to whom payment was made was empowered to collect the money. *Lay v. Honey* ..... 749
15. **Payment to Agent: EVIDENCE SUFFICIENT.** Evidence examined, and held to sustain the finding and judgment of the trial court. *Cheshire Provident Institution v. Gibson*..... 392
16. **Third Persons, Rights of.** The appointment of a "general agent" carries on its face general authority to act for and bind the principal in the line of the principal's business. Hence, as to persons who deal with such an agent in good faith without notice of the exact limits of his authority, the principal will be bound by his acts within the scope of his apparent authority. *Fidelity & Casualty Co. v. Field & Brown* ..... 442

**PRINCIPAL AND SURETY. See MORTGAGES, 37.**

- Replevin Bond: LIABILITY.** The condition of a replevin undertaking being that the plaintiff would pay all "damages and costs" which should be "awarded against him," the surety may be held for costs recovered by the defendant in replevin although the latter may not have paid them. *Campbell v. Laue* ..... 63

**PRIORITIES.** See LANDLORD AND TENANT, 9. TAXATION, 3, 13, 14.

**PROCESS.** See GARNISHMENT, 2.

1. **False Return: VALIDITY OF JUDGMENT.** It is the settled law of this state that a false return of service of process may be impeached by extrinsic evidence and that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void and open to collateral attack. *Baldwin v. Burt*..... 377
2. **Return, Conclusiveness of.** Where, upon the face of his return to a writ, it appears that the officer executing it duly performed his duty and that the same was executed according to law, in the absence of a showing to the contrary, such return is conclusive. *Anthony Loan & Trust Co. v. Fiorelli* ..... 532
3. **Service, Failure of and Irregular, Distinguished.** There is a well-marked distinction maintained between judgments rendered in which there has been no service of summons at all and those rendered where there has been service of summons irregularly made. In the former class the judgment may be collaterally impeached, but in the latter the defect is waived, unless directly assailed. *Muchmore v. Guest*.... 127

**PUBLICATION.** See LIBEL AND SLANDER, 2-4. MORTGAGES, 60.

**QUANTUM MERUIT.** See CONTRACTS, 14. MASTER AND SERVANT.

**QUIETING TITLE.**

1. **Deed Undelivered: RECORD OF: LACHES.** Laches will not be imputed to one from a mere failure to watch the records to guard against the recording of a forged or undelivered deed purporting to be a conveyance of his real estate. *Palmer v. Mizner* ..... 899
2. **Limitation of Actions.** The statute of limitations does not begin to run against an action to cancel a deed, constituting a cloud on the title to real estate, until some right or title is asserted under such deed, and such fact is brought to the knowledge of the holder of the title. *Idem*.
3. **Recording Undelivered Deed: LEASE FROM GRANTEE TO GRANTOR: RECORDING AFTER DEATH OF GRANTEE: EFFECT ON DEED.** The owner of real estate signed and acknowledged a deed of conveyance thereof, and at the same time took back a lease, executed by the grantee, for a life estate in the same premises; he retained possession of both instruments; his grantee obtained possession of the deed and filed it for record, without his knowledge or consent. After the death of the grantee, the grantor, on learning that the deed had been taken from his possession and recorded, filed the lease for record. The deed purports to have been given for a



**QUIETING TITLE—Concluded.**

valuable consideration. *Held*, That his conduct rendered the deed as effective as though formally delivered. *Idem*.

4. ———: NOTICE. The mere record of an instrument, signed and acknowledged by the owner of real estate, but not delivered, which is taken from his possession and filed for record, without his knowledge or consent, by the grantee named therein, is not notice to such owner that such grantee asserts some right or title under the deed. *Idem*.

**RAILROADS. See EMINENT DOMAIN, 2. INJUNCTIONS, 4, 5. OFFICERS, 1.**

1. **Damages for Personal Injuries: EVIDENCE.** Evidence examined, and *held* to support the judgment. *Chicago, R. I. & P. R. Co. v. Hambel*..... 607
2. **Liability, Limitation of: EXCEPTIONS: STATUTES.** Section 3, article 1, chapter 72, Compiled Statutes, prevents any limitation on the liability of a railroad company for a passenger's safety unless within the exceptions provided in the section, and section 5 of the same chapter does not impliedly give the right to a railway company to limit its liability under section 3 by stipulation. *Idem*.
3. **Personal Injuries: PROPERTY TAKEN WITHOUT PROCESS: STATUTES: CONSTITUTION.** Section 3, article 1, chapter 72, Compiled Statutes, is not inimical to the fourteenth amendment to the constitution of the United States, nor to section 3, article 1, of the constitution of this state, as tending to deprive railroad companies of their property without due process of law. *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb., 689, followed. *Idem*.
4. ———: **STATUTES.** By section 3, article 1, chapter 72, Compiled Statutes, a right of action is given to a person for all injuries sustained while a passenger of a railroad company, except where the injury is occasioned by his own criminal negligence, or by his violation of some express rule or regulation of the carrier actually brought to his notice. *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb., 689, followed. *Idem*.
5. **Shipment Beyond Terminus: LIMITING LIABILITY BY CONTRACT.** When a railway company receives goods for shipment to a point beyond the terminus of, or at a distance from, its own line, so that for a part of the distance they will require to be transported over the lines of other carriers, and collects the entire charge for transportation, it will be held to have assumed responsibility for safe carriage over every part of the route, and the liability so incurred can not be evaded or limited even by express contract. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463. *Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.*..... 784

**RECEIVER.**

1. **Compromise: ACCEPTANCE BY COURT: DISCRETION.** An offer of compromise, made by debtors of an insolvent bank to the receiver thereof, examined, and *held* there was no abuse of discretion on the part of the trial court in directing the receiver to accept it. *Morrison v. Lincoln Savings Bank & Safe Deposit Co.* ..... 762
2. **Notice of Application: "PARTIES TO BE AFFECTED" UNDER STATUTES.** The "parties to be affected thereby" who are required to be notified of an application for appointment of a receiver of real property under section 267, Code of Civil Procedure, are those having an interest in the possession of the property in controversy or its immediate custody, and in the immediate disposition of rents, issues or profits accruing therefrom. *Chambers v. Barker*..... 523
3. **Pleading: AUTHORITY TO PROSECUTE SUIT.** In an action by a receiver the plaintiff must plead and prove authority from the court appointing him to begin and prosecute the suit. *Darner v. Gatewood* ..... 561
4. ———: **SUFFICIENCY OF AVERMENTS NOT DENIED.** Where a verified application for the appointment of a receiver in foreclosure proceedings avers that the property in controversy is insufficient to pay the sums for which it is liable, and such averment is nowhere denied or controverted, a finding accordingly is sufficiently sustained and an order appointing a receiver is proper. *Chambers v. Barker*..... 523

**RECORDS.** See EVIDENCE, 11. INTOXICATING LIQUORS, 1. QUIETING TITLE, 1.

**REPLEVIN.** See APPEAL AND ERROR, 107. BONDS. PRINCIPAL AND SURETY.

1. **Bonds: ACTION ON: MATTERS CONCLUDED BY JUDGMENT IN REPLEVIN.** In an action upon a replevin bond the right of possession of the goods taken and the value of that possession will be treated as matters conclusively determined by the verdict and judgment in replevin. *Smith v. Bowers*.... 611
2. ———: ———: **PLEADING: ANSWER: PROOF IN MITIGATION OF DAMAGES.** Under an answer in a suit on a replevin bond, which consists only of denials and an allegation that the goods have been returned, the defendants are not entitled to prove, in mitigation of damages, that the goods, or part of them, which were taken in execution by a sheriff, were not the property of the execution defendant. *Idem*..... 613
3. ———: ———: ———: **EXCUSE FOR BREACH.** In an action upon a replevin bond, matters in excuse of a breach of the condition of the bond can not be availed of as a defense unless they are specially pleaded. *Idem*..... 611

**REPLEVIN—Continued.**

4. ———: FAILURE TO GIVE: ALTERNATIVE JUDGMENT WITHOUT PREJUDICE. In an action in replevin under section 193 of the Code the judgment should be for the amount of damages found due the plaintiff by the verdict of the jury and should not be for the return of the property; but where a judgment is entered in the alternative for the return of the property or the damages assessed, the defendant can not complain of such an irregularity in the form of the judgment, because it is without prejudice to him. *Sloan v. Fist..* 664
5. ———: ———: STATUTES: MEASURE OF DAMAGES. Where a plaintiff in replevin fails to give an undertaking and the action proceeds under section 193 of the Civil Code, the measure of plaintiff's damage is the value of the property taken, with seven per cent. interest from the time of the wrongful taking. *Idem.*
6. Evidence: ADMISSION. The action of a trial court in admitting and excluding testimony, approved. *Idem.*
7. ———: SUFFICIENCY. Evidence examined, and held in part to sustain the verdict and judgment. *Rumley Co. v. Jelsma.* 330
8. Instructions: APPEAL AND ERROR. Instructions examined, and held properly given. *Sloan v. Fist.....* 664
9. Plaintiff Without Interest: PRESUMPTION OF VALUE OF DEFENDANT'S RIGHT. In a replevin action brought to this court on error, where there is a total failure of evidence to show that plaintiff had any interest in the property, it will be presumed that the value of the defendant's right to the possession of the property is the same as its value, found by the verdict of the jury. *Kingman Implement Co. v. Strong.....* 729
10. Pleading: GENERAL DENIAL: PROOF OF RIGHT TO POSSESSION: DIRECTING VERDICT: MEASURE OF DAMAGES. In an action of replevin, where the plaintiff claims to be the absolute owner of the property and entitled to the immediate possession of it, and the defendant's answer is a general denial, the plaintiff must establish his ownership or the right to the immediate possession of the property by some competent evidence. If he fails to do this, it is the duty of the court to direct the jury to return a verdict for the defendant. In the absence of any showing to the contrary the value of the defendant's right of possession is the value of the property in controversy. *Northwall Co. v. McCormick Harvester Machine Co. ....* 699
11. ———: ———: SETTING OUT DEFENSES.. Where a defendant in replevin sets up a number of affirmative defenses in his answer, in addition to a general denial, it is not error to strike them out on motion, since anything making against

**REPLEVIN—Concluded.**

- the plaintiff's cause of action may be shown under the general denial. *Livingston v. Moore*..... 498 .
12. **Possession of Property: FORM OF JUDGMENT.** Where plaintiff begins an action of replevin and fails to procure possession of the property sued for, but continues the action as one for damages, an alternative judgment for the return of the property or its value is not required. *McCarty v. Morgan*, 274
13. **Trespasser: QUERE.** Whether one in peaceful possession of personal property, and with no stronger title, may not maintain replevin against a trespasser, who disturbs his possession, *quere*. *Nelson v. City of Beatrice*..... 47

**RES GESTAE.** See WILLS, 7.

**RESIDENCE.** See ATTACHMENT. LIMITATION OF ACTIONS, 1, 2.  
SCHOOLS AND SCHOOL DISTRICTS, 3.

**RES JUDICATA.** See JUDGMENT, 13.

**RESTITUTION.** See JUDICIAL SALES, 15.

**SCHOOLS AND SCHOOL DISTRICTS.**

1. **Admission of Child to School: WHO MAY COMPEL.** The father of a child of school age, or one standing in *loco parentis* to the child, may maintain an action to compel the directors of a school district to allow the child to attend a school of which such child is a *bona fide* resident. *Mizner v. School District*.....238, 242
2. **Admission to School Denied: INJUNCTION.** Where a child of school age is wrongfully denied admission to the public school of a district, an injunction may properly issue to restrain the directors of the school from interfering with her attendance. *Idem*.
3. **Bona Fide Residence: EVIDENCE.** Evidence examined, and held sufficient to support a finding of the court that a child was a *bona fide* resident of a school district. *Idem*.

**SERVICE.** See PROCESS, 3.

**SET-OFF AND COUNTER-CLAIM.** See CONTRACTS, 19. LANDLORD AND TENANT, 3.

**Partnership Debt as Against Debt Due Partner: ATTORNEYS' LIENS.** G. obtained judgment against the firm of C. & F. for eight hundred dollars. On the rendition of the judgment, W. and P., attorneys for G., filed their claim for an attorneys' lien on the judgment and gave notice thereof. Afterwards, F., one of the partners, commenced an action against G. on a note made to him by G., alleging that both C., the other member of the firm, and G., the judgment creditor, were insolvent, and that he alone was responsible.

**SET-OFF AND COUNTER-CLAIM—Concluded.**

He asked that any judgment entered against G. on the note might be set off against the judgment entered in favor of G. against C. & F. W. and P. intervened and asked that their attorneys' lien be protected. *Held*, That to the extent of their lien the attorneys should be protected and that to that extent the set-off could not be allowed. *Finney v. Gallop...* 480

**SHERIFFS AND CONSTABLES.** See JUDICIAL SALES, 16.

1. Indemnity Bond: DEFENSE. Where an officer indemnified against judgments on account of a levy has on the strength of the indemnification held property against a third party's claim, the merits of that party's action, in which judgment has gone against the officer and been paid, can not in the absence of any stipulation to that effect be inquired into in a suit on the indemnity bond. *Omaha Carpet Co. v. Clapp* ..... 406
2. ———: JUDGMENT. In such a case, in the absence of fraud or collusion, the sole question is whether the judgment is fairly included in the terms of the bond. *Idem*.
3. ———: PENALTY: INTEREST. In a suit on a bond with a penalty, interest can be added to the full amount of the penalty only from the date of the breach alleged. *Idem*.

**SIGNATURES.** See EVIDENCE, 6. INTOXICATING LIQUORS, 2. VENDOR AND PURCHASER, 5.

**STATUTES.** See APPEAL AND ERROR, 7. CONTRACTS, 7. CORPORATIONS, 1. COUNTIES, 1, 4. DIVORCE, 2. EMINENT DOMAIN, 1. EVIDENCE, 11. FORCIBLE ENTRY AND DETAINER, 1, 2. GARNISHMENT, 3. HOMESTEAD, 2. INJUNCTION, 3. INTOXICATING LIQUORS, 6. JUDGMENT, 3, 14-16. JUDICIAL SALES, 2, 3. LIMITATION OF ACTIONS, 1. MANDAMUS, 2. MORTGAGES, 38-42. MUNICIPAL CORPORATIONS, 3. OFFICERS, 1-3. RAILROADS, 2-4. RECEIVER, 2. REPEVIN, 5. TAXATION, 6, 17, 18. TRIAL, 9. WILLS, 6. WITNESSES, 5.

**STIPULATIONS.** See BILLS AND NOTES, 12.

**STOCK.** See BUILDING AND LOAN ASSOCIATIONS, 2, 7-9.

**STREETS.** See MUNICIPAL CORPORATIONS, 5, 6.

**SUBSCRIPTIONS.** See CREDITORS' SUIT, 1.

**SUPERSEDEAS.** See APPEAL AND ERROR, 10. JUDGMENT, 14. MORTGAGES, 8.

**TAXATION.** See ESTOPPEL, 2. OFFICERS, 2, 3, 5.

1. Caveat Emptor. The rule of *caveat emptor* applies to the purchaser of real estate at a tax sale. *Concordia Loan & Trust Co. v. Douglas County*..... 124
2. Certificate: EVIDENCE. A tax certificate is presumptive evi-

**TAXATION—Continued.**

- dence of the regularity of all proceedings leading up to the sale, including the assessment and levy. *Merrill v. Wright*, 41 Neb., 351, overruled. *Alling v. Woodard*..... 235
3. **Deduction of Tax Liens: PRIORITY: MORTGAGES.** By the terms of section 138, article 1, chapter 77, Compiled Statutes, 1899, taxes upon real estate are a lien thereon from and including the first day of April in the year in which they are levied, until the same are paid. *Cushman v. Taylor*..... 793
4. **Description: SALE TOO INCLUSIVE.** Where an entire tract of land is sold at private tax sale for special city assessments levied against only a portion thereof, and a tax receipt is issued in pursuance of such sale, in which the entire tract is described, such sale can not be said to have been made "in consequence of error in describing such land in the tax receipt," within the meaning of said section. *Concordia Loan & Trust Co. v. Douglas County*..... 124
5. **Foreclosure by Assignee of Tax Lien: COMPUTATION OF AMOUNT DUE.** In an action to foreclose a tax lien, by the assignee thereof, in computing the amount due thereon, it is error to include subsequent taxes paid by the assignor, subsequent to the assignment. *Alling v. Woodard*..... 235
6. **Foreclosure of Lien: DESCRIPTION: ADMISSION: STATUTES.** Property sold for delinquent taxes was described in the tax-sale certificate as "balance of tax lot 31, section 34, township 15, range 13," and was described in the same terms on the tax lists and county records. In their answer to the petition praying a foreclosure of the tax lien defendants admitted the ownership by one of the defendants of the property described and their interest therein as alleged. *Held*, That under the provisions of section 142, article 1, chapter 77, Compiled Statutes, 1901, the description was sufficient. *Concordia Loan & Trust Co. v. Van Camp*..... 633
7. ———: **EVIDENCE: CERTIFICATES AND RECEIPTS.** In an action of foreclosure upon a tax-sale certificate, and for subsequent taxes and special assessments paid, such certificate and receipts signed by the proper officer are *prima facie* evidence of the validity of the taxes represented by them. *Ure v. Reichenberg*, 63 Neb., 899, followed. *Concordia Loan & Trust Co. v. Van Camp*..... 633  
*Starr v. Voss*.....!..... 642
8. ———: ———: **SUFFICIENT.** Evidence examined, and held sufficient to warrant the finding and decree of the trial court. *Pettibone v. Yeiser*..... 65
9. ———: **LIMITATION OF ACTIONS.** When land has been sold for taxes and the suit to foreclose the lien therefor is not instituted within five years from the expiration of the time

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- to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself. *Alexander v. Shaffer*, 38 Neb., 812, followed. *Osgood v. Westover*..... 668
10. ———: PLEADING: CONSTRUCTION. Pleadings construed and held to entitle plaintiff to a judgment. *Starr v. Voss*... 642
11. ———: SALE OF TRACTS SEPARATELY. Sales of real estate upon foreclosure of tax liens should be, as far as practicable, the same as upon mortgage foreclosures, and unless the decree provides otherwise the tracts or lots must be appraised and sold separately. *Roher v. Fassler*..... 262
12. Liens: ATTACH WHEN. A statutory lien for taxes due exists upon all personal property of the tax debtor (within the county) from and after the tax lists are made and delivered to the county treasurer. *Blanchard, Shelly & Rogers v. Logan County*..... 516
13. ———: CHATTEL MORTGAGE PRIOR: SALES. Where a sheriff levies distress warrants for delinquent taxes for several years upon property of the tax debtor upon which a valid chattel mortgage exists, the seizure and sale of the property is wrongful and unauthorized to the extent, and for the years, the mortgage lien is prior and superior to the lien for delinquent taxes. *Idem*.
14. ———: ———: A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches. *Idem*.
15. Levy for Unauthorized Purposes: CONFESSION OF JUDGMENT BY COUNTY. *Chicago, B. & Q. R. Co. v. Lomax*..... 193
16. Levy in Excess of Legal Limit: REMEDY: TENDER. Where a tax is levied in excess of the legal limit, a taxpayer is not restricted to the statutory remedy but may tender the amount assessed against him less such excess. *Clark v. Colfax County* ..... 133
17. Levying Special Assessments: STATUTORY CONSTRUCTION. Statutory provisions as to the manner of levying special assessments must be strictly complied with. *Farmers Loan & Trust Co. v. Hastings*..... 337
18. Statutes: CAUSES OF ACTION: MORTGAGES. Under the provisions of section 179, article 1, chapter 77, Compiled Statutes, 1899, a certificate of tax sale, together with prior and subsequent taxes paid, constitute a single cause of action. *Cushman v. Taylor*..... 793

**TENDER. See TAXATION, 16.**

1. Kept Good: INTEREST. If a tender of taxes is rejected, and is kept good by the party making it, in an action for the

**TENDER—Concluded.**

recovery of such taxes, no recovery can be had for interest accruing after such tender. *Clark v. Colfax County*..... 133

2. **Objected to on Certain Grounds Waives Others.** Where a tender is accompanied by a condition, and the party to whom the tender is made makes no objection to such condition, but rejects the tender on the sole ground that the amount tendered is insufficient, the condition does not vitiate the tender. *Idem.*

**TIMBER.** See HOMESTEAD, 6.

**TITLE.** See BANKS AND BANKING, 1. DESCENT AND DISTRIBUTION, 2. EJECTMENT, 2. EXECUTIONS, 1. HOMESTEAD, 6.

**TRANSCRIPT.** See APPEAL AND ERROR, 103-105. JUDGMENT, 14.

**TRESPASS.** See REPLEVIN, 13.

**Tortious: Possession.** No one can found possession on a tortious trespass alone; nor can any one acquire a right by the commission of a wrong. *Carter v. Warner*..... 688

**TRIAL.** See GUARDIAN AND WARD.

1. **Appeal and Error: INSTRUCTION: WITHDRAWING ISSUE.** An instruction which substantially withdraws an issue in the case is erroneous. *Russell v. Gunn*..... 141
2. **Arguments: LIMITATION OF: DISCRETION.** It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed. *Dixon v. State*, 46 Neb., 298. *Schrandt v. Young*..... 546
3. **Challenge to Juror: GROUNDS.** Overruling of challenge on the ground that a talesman called had served on a former case at same term, *held*, no error. *Carlson & Hanson v. Holm* ..... 38
4. **Cross-Examination of Witnesses: IMMATERIAL POINT.** Not error to refuse to permit cross-examination as to transactions not expressly mentioned by witness in chief and which were not strictly material to the case. *Idem.*
5. ———: **LIMITATION OF: REPETITION.** Limiting cross-examination where no further unanswered question is tendered and the testimony sought would be repetition, not error. *Idem.*
6. **Election to Plead Over: EFFECT.** Having elected to plead over plaintiff cannot open up for review the order of the court in sustaining a demurrer to his petition. *First Nat. Bank of Hastings v. Farmers & Merchants Bank*..... 104
7. ———: **Rule When Amended Petition Is Filed.** This



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- waiver also attaches to an amended petition which is filed after demurrer and which is similar in all material respects to and contains no averments different from those contained in the original petition. *Idem.*
8. **Examination of Witnesses: LEADING QUESTIONS.** Permitting certain leading questions, *held*, not reversible error under the circumstances. *Carlson & Hanson v. Holm*..... 38
  9. **Findings: LAW AND FACT: STATUTES.** A mere request for findings as to certain specified facts is not a request for separate findings of law and fact, under section 297 of the Code of Civil Procedure. *Arthelm v. Chicago, R. I. & P. R. Co.* ..... 444
  10. ———: **REQUEST FOR: DISCRETION.** A request for special findings is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it appear there has been an abuse of discretion. *City of Crete v. Hendricks* ..... 847
  11. **Instructions Must Accord With Issues and Evidence.** It is a fundamental rule that the instructions in a case must be given with reference to the evidence adduced upon the trial, and must be applicable to the issues made by the pleadings. Instructions asked for not fairly within this rule should be refused. *Rath v. Rath*..... 600
  12. **Jury: RECALLING TO GIVE RECOLLECTION OF TESTIMONY.** While it is permissible for the trial court after a jury is sent out to deliberate on its verdict to recall it and give his recollection as to the testimony on a point in dispute in the presence of or after notice to the parties or their counsel, yet this practice has never been looked upon with favor by this court. *Bonawitz v. De Kalb*..... 534
  13. **Misconduct: COUNSEL: PREJUDICE.** The argument of counsel to the jury should be limited to a discussion of the facts in evidence and the reasonable inferences deducible therefrom. Certain language in argument, while a slight departure from the legitimate rules of debate, *held* not to have been prejudicial to defendant's rights. *Heater v. Penrod* ..... 711
  14. ———: ———: **REBUKE BY JUDGE.** When counsel, in their overzeal, in the argument of a case to a jury depart from the record, a sharp and prompt rebuke from the trial judge will ordinarily cure the error. *Brown v. Silver*..... 164
  15. ———: **JURY: INTOXICATING LIQUORS.** Where a jury was impaneled and trial proceeded till six o'clock with an adjournment till nine next morning, the drinking of two small glasses of lager beer in the evening, at a public saloon, and by the same juror of a whiskey glass of whiskey and black-

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berry brandy, mixed, about eight o'clock in the morning, and the drinking at the latter time and place by another juror of the same quantity of whiskey, unmixed, will not of itself require the setting aside of a verdict reached on the second day. *Ankeny v. Rawhouser* ..... 32

16. **Right to Open and Close.** Where a judgment would go against plaintiff if no evidence were produced, it is not error to refuse defendant the right to open and close at hearing of case. *Arthelm v. Chicago, R. I. & P. R. Co.* ..... 444

17. **Verdict: AGAINST "THE DEFENDANT," WHEN MORE THAN ONE.** Only one of two defendants being served with process or having appeared, a verdict against "the defendant" is a verdict against the defendant in court. *Storey v. Kerr* ..... 568

18. ———: **JUDGMENT AGAINST PARTY NOT IN COURT: COMPLAINT BY CODEFENDANT.** If the action admits of a several judgment, the defendant who was served with process and appeared and tried the case may not complain that judgment was entered irregularly against the other defendant as well. *Idem*.

19. ———: **TIME FOR OBJECTING TO: WAIVER.** Objections to the form of a verdict must be made when it is rendered, and before the jury is discharged. Objections not made and exceptions not taken to it until a motion for a new trial is filed will be deemed to have been waived. *Kingman Implementation Co. v. Strong* ..... 729

20. **Viewing Premises: INSTRUCTIONS.** *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb., 322, followed. *City of Lincoln v. Sager* ..... 598

**TRUSTS.** See **BANKS AND BANKING**, 2, 7, 8. **CORPORATIONS**, 4-6.

**Banks and Banking: DEPOSIT TO PRIVATE ACCOUNT: RETAINS ITS CHARACTER.** Trust funds do not lose their character as such by being deposited in a bank by the trustee to his own account. *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, followed. *Union Stock Yards Nat. Bank v. Haskell* ..... 839

**USURY.** See **BUILDING AND LOAN ASSOCIATIONS**, 10, 11.

1. **Available as Defense: WHEN.** Although usury is a personal defense not available to another than a party to the contract, yet in an instance in which the contract for usury is separable and separate from the agreement to pay interest it is non-enforceable against any person. *Bean v. People's Building, Loan & Savings Ass'n* ..... 810

2. **Interest Taken in Advance.** Interest or any part of the interest agreed upon for a loan of money may be taken in advance, and the transaction is not usurious provided the amount retained as advanced interest and the rate stipu-

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- lated for in the note do not together exceed ten per cent. for the time the loan is to run. *Pierce, Wright & Co. v. Davey*, 43 Neb., 45. *Foster v. Pitman*..... 672
3. **Mortgage: FORECLOSURE: BORROWER MAY PLEAD USURY.** But if the borrower and mortgagor has retained any interest in the mortgaged premises, or any personal liability is sought to be enforced against him, he may set up usury and pray for cancellation in a suit to foreclose the mortgage, although a purchaser of the mortgaged premises joined with him as a defendant, and joining in the answer, might not do so. *People's Building, Loan & Savings Ass'n v. Palmer*..... 461
4. **Penalty: PRESUMPTIONS.** As the statutes of this state do not provide for forfeiture of the whole loan or avoidance of the whole contract in case of usury, or impose other penalty, but merely limit recovery to the sum actually loaned, such presumption obtains equally in cases where usury is pleaded. *People's Building, Loan & Savings Ass'n v. Backus*..... 463
5. **Plead: WHO MAY NOT.** The defense of usury is of no avail to the purchaser of the equity of redemption, who has assumed and agreed to pay the mortgage debt. *People's Building, Loan & Savings Ass'n v. Picard*..... 144
6. ———: **WHO MAY.** Usury is a defense personal to the borrower which may not be asserted by a purchaser of mortgaged premises who has assumed the mortgage. *People's Building, Loan & Savings Ass'n v. Palmer*..... 460

**VACATION.** See JUDGMENT, 15, 16. MANDAMUS, 5.

**VALUE.** See DAMAGES, 2. EVIDENCE, 8. JUDICIAL SALES, 4. MORTGAGES, 17, 23, 24. REPLEVIN, 9. WITNESSES, 1.

**VARIANCE.** See CONTRACTS, 18.

**VENDOR AND PURCHASER.**

1. **Breach of Contract to Repair: DAMAGES.** In an action by the vendor of a harvesting machine to recover the purchase price, breach of an agreement by the plaintiff to put the machine in repair so that it will do good work in the following season, does not entitle the defendant to recoup, as damages, the loss occasioned by the injury to his grain by reason of its not having been harvested in due season. *Warder, Bushnell & Glessner Co. v. Myers*..... 507
2. **Fraud: KNOWLEDGE BY GRANTEE: EVIDENCE: SUFFICIENT.** Evidence examined, and held to sustain finding of trial court that the grantee was charged with knowledge of the fraudulent purpose of his grantor in making the deed. *Coffield v. Parmenter* ..... 42
3. **Fraudulent Conveyances: RECOVERY OF PURCHASE PRICE.** An action can not be maintained by a vendor or his assignee

**VENDOR AND PURCHASER—Concluded.**

to recover from his vendee the purchase price of property conveyed in fraud of creditors. If in such case the transferee participated in the fraud, the maxim, *in pari delicto potior est conditio defendentis*, applies. If he did not, and the property has been taken from him, without his fault, by the defrauded creditors, there has been a breach of the warranty title accompanying the sale which will defeat a recovery. *McConaughy v. Farney*..... 638

4. **Fraudulent Intent in Sale.** On an issue as to the validity of a sale of cattle as against creditors, the circumstances that the cattle remained at all times in the possession of the vendor; that no payment was made till long after the alleged date of the sale; that the vendor was insolvent; that there was no inspection of the cattle before purchase; that a check given in payment was not presented for some time after the date it bears, and not till after execution issued against the vendor; and that the purchase money did not go to the vendor, but by his direction to a daughter whom he claimed to owe, *held* sufficient to justify a finding of fraudulent intent in both parties. *Bokhoof v. Stewart*..... 714

5. **Contracts: SIGNATURE OF VENDEE.** Where a vendor signs a written agreement to sell and convey real property and the vendee accepts the same and goes into possession under it, there is a complete contract between the parties and it is not necessary that the vendee sign also, although the instrument is so worded as to indicate that his signature was contemplated. *Chambers v. Barker*..... 523

**VERDICT.** See APPEAL AND ERROR, 106-108. PLEADING, 14. TRIAL, 17, 18.

**VIEWING PREMISES.** See TRIAL, 20.

**WAIVER.** See APPEAL AND ERROR, 11, 109. BILLS AND NOTES, 12. INSURANCE, 4. JUDGMENT, 12. JUDICIAL SALES, 8. LIMITATION OF ACTIONS, 5. PLEADING, 5, 13. TENDER, 2. TRIAL, 19.

**WATERS AND WATERCOURSES.** See EVIDENCE, 15. HIGHWAYS, 3.

1. **Modifying Decree.** The decree examined, and *held* that it should be modified, and, as modified, affirmed. *Andrews v. Village of Steele City*..... 676
2. **Surface Waters: INJUNCTION AGAINST VILLAGE.** A city or village may not accumulate the surface waters which fall upon its site or any portion thereof and by means of a ditch or ditches discharge them in a volume upon the lands of another to his injury and damage. Injunction is a proper remedy to prevent and restrain such unlawful action. *Idem.*

**WILLS.** See EXECUTORS AND ADMINISTRATORS, 2.

1. **Construction: CONVERSION OF ESTATE INTO PERSONALTY: TIME OF CONVERSION.** Where the provisions of a will are of such a character as to amount to a positive direction to convert the testator's real estate into money or personalty, or where by a fair construction of the will such intention of the testator is clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money took place at the time of his death. *Chick v. Ives*..... 879
2. ———: ———: ———. Will examined, construed, and held that it worked an equitable conversion of the testator's real estate into money at the time of his death. *Idem*.
3. ———: **INTENTION OF TESTATOR: HOW ASCERTAINED.** In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and a comprehensive view of all of the provisions of the will. The court will place itself, as nearly as possible, in the position of the testator, ascertain his will, and, if lawful, enforce it. *Idem*.
4. **Contest: DECLARATIONS OF TESTATOR SUBSEQUENT TO MAKING WILL.** Mere declarations of a testator subsequently to the execution of a will are not evidence, in a contest of the will on the sole ground of undue influence, of any fact as to the existence of such influence stated in them. *Davidson v. Davidson* ..... 90
5. ———: ———: **WHEN NOT ADMISSIBLE.** In the absence of independent proof of undue influence where the sole issue is as to its existence, such declarations are not admissible for any purpose. *Idem*.
6. ———: **EVIDENCE UNDER RECITAL IN WILL: ADMISSIBILITY.** A recital in a will offered for probate does not warrant the admission of evidence, which is otherwise inadmissible under section 329 of the Code, merely in order to contradict such recitals. *Idem*.
7. ———: **RES GESTÆ.** A conversation fifteen or twenty minutes after the execution of a will, between the testator and a subscribing witness in the absence of the other subscribing witness who drew it and in a different building from the one where it was made, which conversation refers to the will as already made and contemplates its continued existence, is not admissible as part of the *res gestæ*. *Idem*.
8. **Conversion of Estate Into Personalty at Death: INTEREST OF HEIRS IN REALTY.** Where there is a conversion of real estate into money at the time of the testator's death, the heirs have no interest in the real estate, as such; and a mortgage given by one of them, upon and describing an

**WILLS—Concluded.**

- undivided interest in the testator's real estate, creates no lien thereon which can be enforced in an action of foreclosure. *Chick v. Ives*..... 879
9. **Instructions: PREJUDICE.** An instruction in effect to find for contestants, if the testator made the will only to keep peace in the family, *held* prejudicial error, the only issue being as to undue influence. *Davidson v. Davidson*..... 90
10. **Mortgages and Judgments: ASSIGNMENTS BY HEIR: VALIDITY.** If the mortgage and judgments set forth in the record were an assignment of the interest of Emma L. Ives in the estate (which is not decided), she having been paid her full share thereof, there was nothing on which the assignment could operate. *Chick v. Ives*..... 879
11. **Residuary Estate, Rights of Legatees in.** If a will gives legacies generally and also gives the residue of the real and personal estate in one mass, the legacies constitute a charge upon the whole residuary estate, real as well as personal. *Herditchka v. Foss* ..... 428
12. **Residuary Legatee, Executor a: RIGHTS OF PURCHASER.** A purchaser of land from an executor who derives his title through the will as residuary legatee is bound by the terms of the will which impose a charge upon the land. *Idem*.

**WITNESSES.** See APPEAL AND ERROR, 40. APPEARANCE. TRIAL, 4, 5, 8.

1. **Competency: EVIDENCE: VALUE OF PROPERTY.** Resident owners of farm property in the particular locality, who are acquainted with the land in question, are qualified to testify as to its value, although no recent sales have been made in the locality upon which to base the estimate of value. *Greeley County v. Gebhardt*..... 661
2. ———: **DISCRETION.** The competency of expert witnesses is a question largely within the discretion of the trial court, and its rulings thereon will not be reversed unless clearly erroneous as a matter of law. *Schmuck v. Hill*..... 79
3. **Hypothetical Questions: WHAT THEY SHOULD EMBRACE.** All the undisputed pertinent facts of a case should be substantially included in hypothetical questions propounded to expert witnesses. *Schulz v. Modisett*..... 138
4. **Objection to Questions: BY WHAT JUDGED.** An objection to a question propounded to a witness is to be judged by the question itself and its relation to the then state of the case. *Schmuck v. Hill* ..... 79
5. **Party in Interest: STATUTES.** Section 329, Code of Civil Procedure, does not prohibit a party to the suit, or one having a direct legal interest in the result thereof, from

**WITNESSES—Concluded.**

testifying to transactions or conversations relevant to the issues, had with the agent of a deceased person. *Dodd v. Skelton* ..... 475

**WRIT OF ASSISTANCE.**

1. **Jurisdiction at Chambers.** A judge has no jurisdiction at chambers to grant a writ of assistance. *Hartsuff v. Huss*... 145
2. **Mortgage Foreclosure.** A court making a sale under a decree of foreclosure may, when necessary, issue a writ of assistance to put the purchaser in possession. *Magruder v. Kittle* ..... 418

















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